



Citation: *MT v Canada Employment Insurance Commission*, 2023 SST 980

Social Security Tribunal of Canada Appeal Division

Extension of Time Decision

Applicant: M. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 5, 2022
(GE-22-1337)

Tribunal member: Melanie Petrunia

Decision date: July 25, 2023

File number: AD-23-343

Decision

[1] An extension of time to apply to the Appeal Division is granted. However, I am not giving the Claimant permission to appeal. The application will not proceed.

Overview

[2] The Applicant, M. T. (Claimant), was suspended and then dismissed from her job because she did not comply with her employer's vaccination policy. The Claimant applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason that the Claimant lost her job is considered misconduct. It disentitled her from receiving benefits for the period that she was suspended and disqualified her following her termination.

[4] The Claimant appealed to the Tribunal's General Division and her appeal was dismissed. The Claimant now wants to appeal the General Division decision to the Appeal Division, but her application is late. She says that her Record of Employment (ROE) was changed, and her termination is no longer valid.

[5] I am allowing the Claimant an extension of time to file her application for leave to appeal. However, I find that the Claimant's appeal does not have a reasonable chance of success and I am refusing permission to appeal.

Issues

[6] The issues in this appeal are:

- a) Was the application to the Appeal Division late?
- b) Should I extend the time for filing the application?
- c) Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

Analysis

The application was late

[7] The General Division decision was dated October 4, 2022, and the Claimant received it on October 5, 2022.¹ The Claimant filed her application for leave to appeal on March 30, 2023.²

[8] An application for leave to appeal must be made within 30 days after the General Division decision and reasons are communicated to a claimant.³ In this case, the decision was communicated to the Claimant on October 5, 2022. Thirty days from this date was November 4, 2022. The Claimant filed her application for leave more than four months after this date, so it was late.

I am extending the time for filing the application

[9] When deciding whether to grant an extension of time, I have to consider whether the Claimant has a reasonable explanation for why the application is late.⁴

[10] In her application for leave to appeal, the Claimant states that she was not mentally prepared to go further with her appeal. She also says that her status with her employer has changed, and she is no longer terminated. Her ROE has been changed to reflect that she was on a leave of absence.⁵

[11] I find that the Claimant has provided a reasonable explanation for filing her application for leave to appeal late. So, I am considering the Claimant's application for leave to appeal.

¹ AD1-2

² AD1

³ See section 57(1)(a) of the *Department of Employment and Social Development Act*.

⁴ It says this in section 27(2) of the *Social Security Tribunal Rules of Procedure*.

⁵ AD1-5

The Claimant's appeal has no reasonable chance of success

[12] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?⁶

[13] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the *Department of Employment and Social Development Act* (DESD Act).⁷

[14] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) based its decision on an important factual error;⁸ or
- d) made an error in law.⁹

[15] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these grounds of appeal. A reasonable chance of success means that the Claimant could argue her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.¹⁰

⁶ This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.

⁷ DESD Act, s 58(2).

⁸ The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as "willfully going contrary to the evidence" and defined capricious as "marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent" *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

⁹ This paraphrases the grounds of appeal.

¹⁰ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

No arguable case that the General Division erred

[16] In her application for leave to appeal, the Claimant argues that the General Division made an important error of fact. She says that she was terminated for not complying with her workplace policy, but her situation has now changed. The Claimant says that her termination is no longer valid, and a new ROE has been issued showing that she was on a leave of absence.¹¹

[17] The Claimant says that she chose the option on the application form that she thinks will allow her to appeal to get back EI for the period that she was on a leave of absence from October 31, 2021 to December 22, 2022.¹²

[18] The Claimant does not point to any errors in the General Division decision. The General Division had to decide why the Claimant was suspended and then dismissed. It then had to determine whether this reason amounts to misconduct according to the EI Act.

[19] Based on the evidence that was before it, the General Division found that the Claimant was suspended then dismissed for not complying with the employer's vaccination policy.¹³ It found that this was misconduct and dismissed the Claimant's appeal.¹⁴

[20] The Claimant is relying on new evidence, specifically, the fact that she has been reinstated to her previous position and a new ROE has been issued to reflect a leave of absence.

[21] I am not able to consider new evidence at the Appeal Division. There are a few exemptions to this rule, but none apply here.¹⁵ The courts have consistently said that

¹¹ AD1-3

¹² AD1-3

¹³ General Division decision at paras 12 and 13.

¹⁴ General Division decision at paras 35 to 42.

¹⁵ Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal described in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paragraph 8.

the Appeal Division does not accept new evidence. An appeal is not a redo based on new evidence, but a review of the General Division decision based on the evidence it had before it.¹⁶

[22] The Claimant's circumstances may have changed since the General Division made its decision. However, that does not mean that the General Division based its decision on a factual error. It made its decision based on the evidence that was before it. The Claimant has not argued that the General Division made any factual errors based on her circumstances at the time of the hearing.

[23] Previously, a claimant may have been able to file an application to rescind or amend the General Division decision when new facts were present.¹⁷ Recent legislation repealed the rescind or amend provisions of the *Department of Employment and Social Development Act* as of December 5, 2022.¹⁸

[24] Aside from the Claimant's arguments, I have also considered the other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division, and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of law or jurisdiction.

[25] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

Conclusion

[26] An extension of time is granted. Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division

¹⁶ See *Gittens v. Canada (Attorney General)*, 2019 FCA 256 at para 13.

¹⁷ This was allowed under section 66 of the DESDA, now repealed.

¹⁸ *Budget Implementation Act*, 2021, No. 1 (S.C. 2021, c. 23)