



Citation: *SM v Canada Employment Insurance Commission*, 2023 SST 1047

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

# **Leave to Appeal Decision**

**Applicant:** S. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated June 8, 2023  
(GE-22-4160)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** August 4, 2023

**File number:** AD-23-632

## Decision

[1] Leave to appeal is refused. This means the appeal will not proceed.

## Overview

[2] On November 20, 2021, the Applicant (Claimant) applied for EI benefits after her employer dismissed her “without cause”. On December 21, 2021, the Respondent (Commission) disqualified the Claimant from receiving benefits after deciding she’d been dismissed for misconduct under the *Employment Insurance Act* (EI Act).

[3] On October 27, 2022, the Claimant wrote to the Commission to request a reconsideration of that initial decision. Her letter was filed as a request on November 3, 2022. On November 25, 2022, the Commission refused her reconsideration request since it was made late. It determined that the Claimant didn’t have a reasonable explanation for being late and didn’t show she’d had a continuing intention to make a request during the months of her delay. The Claimant appealed the decision to the General Division.

[4] The General Division determined that the Claimant was late in requesting reconsideration of the decision of December 21, 2021. It concluded that the Commission had exercised its discretion in a judicial manner in denying the Claimant’s request to extend the 30-day period to make a request for reconsideration.

[5] The Claimant now seeks leave to appeal of the General Division’s decision to the Appeal Division. She submits that she did not have a fair hearing before the General Division. She submits that the General Division made errors of fact and of law.

[6] I must decide whether there is some reviewable error of the General Division upon which the appeal might succeed.

[7] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

## Issue

[8] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

## Preliminary matters

[9] To decide the Claimant's application for leave to appeal, I proceeded to listen to the recording of the General Division hearing.

## Analysis

[10] 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 that:

(a) the General Division: failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[11] An application for leave 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 on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove her case but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[12] Therefore, before I can grant leave, I need to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

**Does the Claimant raise some reviewable error of the General Division upon which the appeal might arguably succeed?**

[13] The Claimant submits that the General Division made an error in qualifying her friend as a representative. He was only present for moral support. The Claimant submits that she made it clear in her appeal application that she wanted to discuss the issue of her termination on a without cause basis with no misconduct. She was led to believe that the substance of her appeal would be discussed during the hearing.

[14] The Claimant submits that she was not given accurate information to prepare for the hearing. The entire notice of hearing on April 5, 2023, and the hearing itself on April 27, 2023 – did not disclose to her that the substance of her appeal – being the material errors made in the EI denial decision – were to be entirely ignored by the Tribunal. Further, her reasons for filing her appeal at a later date were clearly discussed with the member but these facts are not disclosed in the appeal decision.

[15] The Claimant submits that rather than doing its job to fairly assess the facts and substance of her appeal – the General Division chose to be complicit and corrupt in assisting the Commission to avoid accountability by denying her appeal solely on a procedural basis and by ignoring the substance of the errors committed by the Commission.

**Issue before the General Division**

[16] The Commission's decision dated November 25, 2022, indicates that the Claimant is late in requesting reconsideration of its initial decision of misconduct and that her explanation for being late did not meet the requirements of *Reconsideration Request Regulations*. Therefore, the initial decision of misconduct will not be reconsidered.

[17] In her application to appeal to the General Division, the Claimant indicates that she is appealing said decision communicated to her on November 25, 2022.<sup>1</sup> She attached a copy of the decision to her application.<sup>2</sup>

[18] I note that the Commission's written representations to the General Division filed on December 29, 2022, four months before the hearing, indicate that the reasons for the Claimant's dismissal are not an issue before the General Division. Only its decision to deny the late request for reconsideration.<sup>3</sup>

[19] The Claimant acknowledged the Commission's representations that clearly mention the issue before the General Division. The Claimant was therefore aware of the issue prior to the General Division hearing even though she disagreed.<sup>4</sup>

[20] I note that during the hearing, the General Division member explained to the Claimant, from the beginning, why she could not address the issue of misconduct and reiterated on several occasions that the only issue before her was the delayed request for reconsideration.<sup>5</sup> The Claimant did not make any request for an adjournment on the basis that she was not ready to proceed with the hearing and/or that she was taken by surprise by the issue.

[21] I see no reviewable error made by the General Division when it did not address in its decision the issue of misconduct under the EI Act.

[22] By law, the General Division could only hear the appeal of the Commission's November 25, 2022, decision denying the Claimant further time to make a request for reconsideration.<sup>6</sup> It could not consider the issue of misconduct.

[23] This ground of appeal has no reasonable chance of success.

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<sup>1</sup> See GD2-4.

<sup>2</sup> See GD2-12.

<sup>3</sup> See GD4.

<sup>4</sup> See GD6-2.

<sup>5</sup> Namely, during her initial presentation: 05:20 to 07:35 of the recording of General Division hearing.

<sup>6</sup> Section 113 of the *Employment Insurance Act*.

### **Allegation of corruption and complicity with the Commission**

[24] The Claimant submits that rather than doing its job to fairly assess the facts and substance of her appeal – the General Division chose to be complicit and corrupt in assisting the Commission to avoid accountability by denying her appeal solely on a procedural basis and by ignoring the substance of the errors committed by the Commission.

[25] An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions of a claimant. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.

[26] I find that the Claimant's allegation is not supported by the words and actions of the General Division member. The member clearly identified and explained to the Claimant the issue before her. She proceeded to listen in full to the Claimant's presentation and reiterated several times to the Claimant what she needed to prove to succeed in her appeal. The member explained why she could not hear the Claimant's representations regarding the issue of misconduct. She then expressed her intention of studying the file carefully before rendering her decision. The member's decision is very detailed and contains the applicable law and relevant facts of the case.

[27] I see no material evidence demonstrating conduct from the General Division member that derogates from the standard.

[28] I must reiterate that such a serious allegation should not be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions of a claimant.

[29] I find that this ground of appeal has no reasonable chance of success.

**Violation of a principle of natural justice**

[30] At the hearing, the General Division member acknowledged that the Claimant had brought a friend to the hearing for moral support. However, during the hearing, the friend clearly went beyond being a moral support and acted as a representative. On several occasions, he intervened and advised the Claimant on what she should talk about. I see no reviewable error made by the General Division when it qualified the Claimant's friend to be a representative in its decision. In any event, this qualification had no impact on the fairness of the hearing.

[31] The Claimant was made aware of the issue prior to the General Division hearing and had four months to prepare her response to the Commission's allegations that she did not have a reasonable explanation for why she was late and did not demonstrate a continued intention of requesting a reconsideration. During the hearing, the General Division member gave the Claimant several opportunities to explain the reasons why she was late in filing her request for reconsideration.

[32] I know that the Claimant wanted to be heard on the issue of misconduct. As explained by the General Division member, this simply could not be done until the issue of her late application for reconsideration be first decided in accordance with the law.

[33] I note that the Claimant had a fair hearing. She received adequate notice of the hearing. She had the opportunity to be heard, the right to know what was alleged against her and the opportunity to answer those allegations. I cannot find any breach of natural justice by the General Division.

[34] This ground of appeal has no reasonable chance of success.

## The late application

[35] The General Division had to decide whether the Commission exercised its discretion in a judicial manner when it denied the Claimant's request to extend the 30-day reconsideration period.<sup>7</sup>

[36] The Claimant acknowledged that she did receive the initial decision letter dated December 21, 2021. The General Division determined that she had received the decision by January 14, 2022.

[37] The Claimant filed her reconsideration request on November 3, 2022, more than nine months after the Commission communicated to her its initial decision. The General Division found that the Claimant submitted her reconsideration request late.

[38] The General Division correctly stated that 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.<sup>8</sup>

[39] The General Division correctly stated that when the Commission refuses a late request for reconsideration, it must show that it used its discretionary powers properly.<sup>9</sup>

[40] The General Division determined that the Commission considered the Claimant's statement that she was too emotionally affected after losing her job to request a reconsideration earlier.<sup>10</sup>

[41] Before the General Division, the Claimant reiterated that she did not ask for a reconsideration of the initial misconduct decision earlier because she was too shocked and emotionally distraught to investigate the matter any earlier than she did. She had to

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<sup>7</sup> Section 112 of the Employment Insurance Act.

<sup>8</sup> See article 1(1) of the *Reconsideration Request Regulations*.

<sup>9</sup> See *Canada (Attorney General) v Gagnon*, 2004 FCA 351.

<sup>10</sup> See GD3-34.



focus on providing for her family. She was also upset by the denial of her EI benefits for misconduct. These facts are disclosed in the General Division decision.<sup>11</sup>

[42] The General Division found that the Commission considered all relevant factors when it determined whether the Claimant had a reasonable explanation for the delay and had shown a continued intention to request reconsideration. It considered that the Claimant delayed over nine months before requesting a reconsideration because she was too shocked and emotionally distraught to being dismissed and had to focus on her family during these difficult times. The General Division considered that she had taken no action towards making a request during the entire period of her delay.

[43] The General Division found that the Commission did not consider irrelevant factors. The General Division found that there was no evidence that the Commission acted improperly or in bad faith since it followed the test set out in the law that applies to the length of the Claimant's delay.

[44] The General Division concluded that the Commission had properly exercised its discretion when it determined that the Claimant did not have a reasonable explanation for the delay in making the request for reconsideration and that she did not demonstrate a continuing intention to request the reconsideration. It therefore had no power under the law to change the Commission's late decision.

[45] I see no reviewable error made by the General Division. It properly determined the relevant facts and correctly applied the law in coming to the decision that the Commission acted in a judicial manner when it refused to extend the 30-day period.

### **Final disposition**

[46] In her application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. She has not identified errors in law nor identified any

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<sup>11</sup> See General Division decision, para. 34.

erroneous findings of fact which the General Division may have made in a perverse or capricious manner or without regard for the material before it.

[47] For the above-mentioned reasons and after reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of her request for leave to appeal, I find that the appeal has no reasonable chance of success.

## **Conclusion**

[48] Leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine  
Member, Appeal Division