



Citation: *RM v Canada Employment Insurance Commission*, 2023 SST 1294

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: R. M.
Representative: B. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 13, 2022
(GE-22-2881)

Tribunal member: Stephen Bergen

Decision date: **September 25, 2023**

File number: AD-23-567

Decision

[1] I have decided that the Appeal Division has received the application to the Appeal Division on time, so I do not need to decide whether to grant the applicant more time to appeal.

[2] However, I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[3] R. M. is the Applicant. He made a claim for Employment Insurance (EI) benefits so I will call him the Claimant. Because of temporary legislative changes during the pandemic, the Canada Employment Insurance Commission (Commission) converted the Claimant's claim to the EI Emergency Response Benefit (ERB) program. Under the ERB program, the Commission could immediately advance \$2000.00, and also pay the \$500 weekly benefit. The Commission expected to recover the \$2000.00 advance later in the claim by not paying benefits in certain weeks later in the claim.

[4] The Claimant returned to work and stopped claiming the ERB benefit before the Commission had a chance to recover the advance, so the Commission decided that it had overpaid the Claimant. It asked the Claimant to repay \$2000.00 advance.

[5] The Claimant disagreed with this and asked the Commission to reconsider, but the Commission would not change its decision.

[6] The Claimant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal (Tribunal). The General Division dismissed the appeal on October 13, 2022, because it agreed with the Commission's decision. The Claimant asked the Appeal Division for leave to appeal on May 26, 2023.

[7] I accept that the Claimant's appeal is not late. However, I am refusing leave to appeal. The Claimant has not made out an arguable case that the General Division acted unfairly.

Issues

[8] The issues in this appeal are:

- a) Was the application to the Appeal Division late?
- b) If it was late, should I extend the time for filing the application?
- c) Is there an arguable case that the General Division acted unfairly by not sending its decision to the Claimant in a timely manner?

Analysis

The application was not late

[9] In his Notice of Appeal to the General Division, the Claimant authorized the Tribunal to communicate with him by email. The General Division issued its decision on October 13, 2022. It sent the decision to the Claimant by email the next day.

[10] When the Tribunal sends a document to a party by email, its Rules state that it considers the recipient to have received the document on the next business day.¹ The Rules also allow that a party can show that this rule should not apply to them.²

[11] The deadline to appeal a decision of the General Division to the Appeal Division is 30 days from the date that it is communicated in writing.³ If the document delivery rule applies, the Claimant's deadline was November 13, 2022; 30 days from October 14, 2022.

[12] However, the Claimant has shown that the rule should not be applied in his case. According to the Claimant, he did not learn of the decision until May 11, 2023, when he found out that the Canada Revenue Agency (CRA) had taken the overpayment amount of \$2000.00. He stated that he had been waiting on the General Division decision but

¹ It says this in section 22(3) of the *Social Security Tribunal Rules of Procedure* (Rules).

² It says this in section 22(4) of the Rules.

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

that he received nothing by email, mail, or any other means. He said that the Commission told him that they were also waiting for the decision.⁴

[13] At the same time, I recognize that the Claimant's representative called the Tribunal on May 5, 2023, to ask why they never received the decision and to say that the CRA had recovered the Claimant's advance overpayment out of his tax refund. In that conversation, the representative did not say when the Claimant first learned of the General Division decision.

[14] Clearly, the Claimant knew of the decision before May 5, 2023. I note that the Claimant's original Application to the Appeal Division document used an even earlier date of April 27, 2023. This date appears also to be in connection with CRA's overpayment recovery, although it was not necessarily the date when he first understood that the General Division had denied his appeal.

[15] Regardless of when the Claimant knew of the decision, or understood that the decision was negative, the law says that an application for leave must be made 30 days after the decision was communicated "in writing". So, the question is when the Claimant received the written decision.

[16] I acknowledge that the Claimant said that he did not learn of the decision until May 11, 2023. However, I do not accept that this is an accurate statement, since the Claimant's representative suggested otherwise in the May 5, 2023, phone call.

[17] In response to the May 5, 2023, call from the Claimant's representative, The Tribunal emailed the Claimant a second copy of the General Division decision. I accept that the decision was communicated in writing by the next business day after the May 5 phone call – which would be Monday, May 8, 2023.

⁴ See AD1B-2 and AD1B-3.

[18] Thirty days from May 8, 2023, is June 8, 2023, which would make June 8, 2023, the Claimant's deadline to file the application. The Appeal Division received his application on May 26, 2023 - before the deadline.

[19] I accept that the Claimant's appeal is not late. As a result, I do not need to consider whether I should extend the time for filing the application. I can consider his application for leave to appeal.

I am not giving the Claimant permission to appeal

– General Principles

[20] For the Claimant's application for leave to appeal to succeed, his reasons for appealing would have to fit within the "grounds of appeal." To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal.

[21] The grounds of appeal identify the kinds of errors that I can consider. I may consider only the following errors:

- a) The General Division hearing process was not fair in some way.
- b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
- c) The General Division based its decision on an important error of fact.
- d) The General Division made an error of law when making its decision.⁵

[22] The Courts have equated a reasonable chance of success to an "arguable case."⁶

⁵ This is a plain language version of the grounds of appeal. The full text is in section 58(1) of the DESDA.

⁶ See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

– **Procedural fairness**

[23] In his Application to the Appeal Division, the Claimant selected the ground of appeal concerned with procedural fairness. He argued that it was not fair that the General Division did not send him the decision immediately. Because of this, CRA recovered the \$2000.00 overpayment from his tax refund before he had a chance to challenge the General Division decision.

[24] The Claimant has not argued any other ground of appeal, and he has not argued that the General Division process was unfair in any other way.

[25] There is no arguable case that the General Division made an error of procedural fairness.

[26] First, there is no evidence that the General Division delayed sending the decision to the Claimant. I have accepted the Claimant's word that he did not receive the decision when it was first sent, but that does not mean he has shown the fault lies with the General Division.

[27] The Tribunal records that it emailed the decision on October 14, 2023. There is nothing in the Tribunal's records to suggest that it failed to send the decision on October 14, 2023.

[28] Neither the Claimant nor his representative called the Tribunal to ask about the decision until May 5, 2023. At that time, the Tribunal confirmed with the Claimant's representative that the email address in its records was the Claimant's correct email address. It sent him a second copy to the same email address, and the Claimant did not deny receiving it.

[29] Second, the Claimant's late receipt of the decision does not mean the General Division process was unfair. It could not have changed the General Division decision result. It did not prejudice his ability to be heard or to know the case against him when he had his hearing at the General Division. The lateness of the decision could have only

prejudiced his further appeal to the Appeal Division, but only if it caused the Appeal Division to reject his appeal.

[30] Since the Claimant disagrees with the General Division, it was open to him to argue any ground of appeal he thought to be applicable. When I reviewed the Claimant's original application, I was not clear on what he was arguing about how the General Division made an error. I wrote to him on August 25, 2023, to ask him to expand on the reasons for his appeal. He provided a response on September 18, 2023, but he did not argue any basis for the appeal other than that he received the General Division decision so late.

[31] If the lateness of the decision is his only basis for appeal, it is hard to see how its lateness could have prejudiced him in any way. Had he received the decision immediately, he would have had no basis on which to appeal the General Division decision.

– **Important error of fact**

[32] The only ground of appeal selected by the Claimant involves his assertion of a procedural fairness error.

[33] However, I appreciate that the Claimant's representative is not a lawyer, and may not have framed the appeal in the best possible way. The Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal where the applicant is self-represented.⁷ I accept that this can also apply to applicants who do not have a legal representative.

[34] Accordingly, I have reviewed the record to see if the General Division ignored or misunderstood any significant evidence that might have resulted in an important error of fact.

⁷ *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

[35] I have not discovered any instance in which significant evidence was mishandled, and the General Division's conclusions follow rationally from the evidence before it.

[36] There is no arguable case that the General division made an important error of fact.

[37] The Claimant's appeal has no reasonable chance of success.

Conclusion

[38] I am refusing leave to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division