



Citation: *VM v Canada Employment Insurance Commission*, 2023 SST 1068

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: V. M.

Respondent: Canada Employment Insurance Commission
Representative: Nikkia Janssen

Decision under appeal: General Division decision dated January 30, 2023
(GE-22-2605)

Tribunal member: Neil Nawaz

Type of hearing: In Writing

Decision date: August 11, 2023

File number: AD-23-235

Decision

[1] The appeal is allowed. The General Division acted unfairly by denying the Claimant a full opportunity to be heard. I have decided to return this matter to the General Division for a new hearing.

Overview

[2] The Claimant, V. M., worked as a security guard. On November 14, 2021, her employer placed her on an involuntary leave of absence after she refused to disclose whether she had been vaccinated for COVID-19.¹ The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because her failure to comply with her employer's vaccination policy amounted to misconduct.

[3] This Tribunal's General Division dismissed the Claimant's appeal. It found that the Claimant had deliberately broken her employer's vaccination policy. It found that the Claimant knew or should have known that disregarding the policy would likely result in loss of employment.

[4] The Claimant is now asking for permission to appeal the General Division's decision. She maintains that she is not guilty of misconduct and argues that the General Division made the following errors:

- It proceeded with the hearing in her absence even though she tried to contact the Tribunal to let it know her phone wasn't working;
- misinterpreted the meaning of "misconduct" as set out in the *Employment Insurance Act* (EI Act); and
- It ignored section 29(c) of the EI Act, which says that "just cause" for voluntarily leaving employment exists if the claimant had no reasonable alternative.

¹ The Claimant was later dismissed altogether.

[5] Earlier this year, I granted the Claimant permission to appeal because I thought she had an arguable case. At the Claimant's request, I considered her appeal by reviewing the existing documentary record.

[6] Now that I have considered submissions from both parties, I have concluded that the General Division's decision cannot stand.

Issue

[7] 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.²

[8] My job was to determine whether the General Division committed an error that fell into one or more of the above grounds of appeal.

Analysis

[9] I am satisfied that the General Division proceeded in a way that wasn't fair to the Claimant. Because the General Division's decision falls for this reason alone, I see no need to consider the Claimant's remaining arguments.

The General Division denied the Claimant an opportunity to be heard

[10] Procedural fairness means that an individual can't be penalized by decisions affecting their interests unless they have been first given a reasonable opportunity to present their case.

[11] Here, the General Division proceeded with its teleconference hearing in the Claimant's absence. It appears that the presiding General Division member attempted

² See *Department of Employment and Social Development Act* (DESDA), section 58(1).

to contact the Claimant before commencing the hearing but was unable to reach her. The Claimant says that her telephone was out of order that morning and that she attempted to alert the Tribunal of her connection difficulties. She has provided evidence that, on the morning of the hearing, she sent the Tribunal's IT support team an email but received no acknowledgement other than an automated response.

[12] Given these circumstances, I am satisfied that the General Division did not give the Claimant an adequate opportunity to appear at the hearing and make oral submissions.

Remedy

[13] When the General Division makes an error involving an EI matter, the Appeal Division can fix it by one of two ways: it can (i) send the matter back to the General Division for a new hearing or (ii) give the decision that the General Division should have given.³

[14] In this case, I have no choice but to send this matter back to the General Division for rehearing. That's because I don't think the record is complete enough to allow me to make an informed decision on the merits of the Claimant's case. When I substitute my decision for the General Division's, I can only consider the record that was available to the General Division at the time of hearing. In this case, because the General Division too hastily proceeded in the Claimant's absence, that record is missing her testimony.

[15] Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is inherently better positioned than I am to hear oral evidence and explore whatever avenues of inquiry that may arise from it.

[16] I am reinforced in my decision by the fact that the Commission, while not conceding that the Claimant is entitled to EI benefits, agreed that she did not get a fair chance to present her case at an oral hearing.⁴

³ See DESDA, section 59(1).

⁴ See Commission's written submission dated May 18, 2023, AD4.

Conclusion

[17] For the above reasons, I find that the General Division committed breach of procedural fairness. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a fresh hearing.

[18] The appeal is allowed.

Neil Nawaz
Member, Appeal Division