



Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 1237

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

# **Leave to Appeal Decision**

<b>Applicant:</b>	J. M.
<b>Representative:</b>	D. M.
<b>Respondent:</b>	Canada Employment Insurance Commission

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<b>Decision under appeal:</b>	General Division decision dated July 7, 2023 (GE-23-995)
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<b>Tribunal member:</b>	Stephen Bergen
<b>Decision date:</b>	September 8, 2023
<b>File number:</b>	AD-23-720

## Decision

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

## Overview

[2] J. M. is the Applicant. His appeal concerns his claim for Employment Insurance (EI) benefits so I will call him the Claimant. The Respondent, the Canada Employment Insurance Commission (Commission) reviewed the Claimant's claim and decided that it had paid him benefits to which he was not entitled. It sent him a Notice of Debt. The Claimant disagreed and asked the Commission to reconsider. The Commission would not change its decision. It said that the Claimant was out of time to ask for a reconsideration.

[3] The Claimant appealed to the General Division of the Social Security Tribunal and the Tribunal scheduled a teleconference hearing for June 26, 2023, at 8:30 a.m. Three days before the hearing, the Claimant asked for the hearing to be rescheduled. However, the General Division proceeded on June 26 as scheduled. The Claimant did not attend.

[4] The General Division allowed the Claimant's appeal, but the Claimant still wants to appeal its decision to the Appeal Division. He says that the General Division acted unfairly when it refused to reschedule his hearing and held the hearing without his participation.

[5] I am refusing leave to appeal. The Claimant has not made out an arguable case that the General Division acted unfairly.

## Issue

[6] Is there an arguable case that the General Division acted unfairly by proceeding with the hearing in the absence of the Claimant?

## Analysis

### General Principles

[7] For the Claimant's application for leave to appeal to succeed, his reasons for appealing would have to fit within the "grounds of appeal." The grounds of appeal identify the kinds of errors that I can consider.

[8] 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.<sup>1</sup>

[9] 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. Other court decisions have equated a reasonable chance of success to an "arguable case."<sup>2</sup>

### Error of procedural fairness

[10] The only ground of appeal that the Claimant selected in completing his application to the Appeal Division was the ground of appeal concerned with procedural fairness. He argued that he could not attend the hearing because the Tribunal did not give him enough notice of the hearing and because he could not take time away from his job.

[11] In his Notice of Appeal to the General Division, the Claimant authorized the General Division to communicate with him by email.<sup>3</sup> The General Division emailed the

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<sup>1</sup> This is a plain-language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

<sup>2</sup> See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

<sup>3</sup> See GD2-3.

Claimant a Notice of Hearing on June 7, 2023. According to the *Social Security Tribunal Rules of Procedure* (Rules), the Tribunal may presume emailed documents to be received on the next business day.<sup>4</sup> In this case, the Tribunal may presume that the Claimant received the notice on June 8, 2023. The Claimant has not shown that this rule should not apply to him.

[12] The Rules also provide that the Tribunal must grant a party's request to reschedule a hearing if it is their first request, if they are available for a rescheduled hearing within two weeks of the originally scheduled date, and if they ask at least five business days before the hearing.

[13] In this case, the Tribunal did not have to agree to reschedule because the Claimant waited too long to ask. The Claimant only called the Tribunal about rescheduling on Friday, June 23, 2023. His hearing was set to go ahead the following Monday.

[14] Parties may also ask the Tribunal to reschedule in other circumstances, but they must explain why they are asking to reschedule.<sup>5</sup> The Claimant said that he was unable to attend but he did not say why. The Tribunal attempted to call him back to ask for his reasons, but could not reach him except to leave a voice mail message.

[15] In a separate letter to the Claimant on June 26, 2023, the Tribunal emailed the General Division member's decision to deny the Claimant's request to reschedule. The letter indicated that the hearing would still take place as scheduled at 8:30 a.m.

[16] The General Division also considered whether rescheduling was necessary for a fair hearing. It decided that it was not.<sup>6</sup> It said that the only issue was whether the Commission should have granted the Claimant an extension of time to file a reconsideration request and it noted that the Claimant had already provided his arguments why he delayed asking for the reconsideration.

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<sup>4</sup> See section 22(1) of the Rules.

<sup>5</sup> See section 22(2) of the Rules.

<sup>6</sup> See GD5-1: The Tribunal's June 26, 2023, letter, denying the Claimant's request for rescheduling.

[17] The General Division proceeded with the hearing in the absence of the Claimant. The General Division considered that the Notice of Hearing had been sent to the Appellant and that the Appellant had called the Tribunal in response. It was satisfied that the Claimant received the Notice and was aware of the hearing.<sup>7</sup>

[18] According to the audio recording of the hearing, the General Division member began the teleconference hearing at 8:30 a.m. on June 26, 2023, and concluded the hearing at 9:00 a.m. after waiting for the Claimant to join the call. At 3:11 p.m., the Claimant emailed the Tribunal to say that he had had to work in the morning and had a heavy work schedule.<sup>8</sup>

[19] The Claimant has not made out an arguable case that the General Division acted unfairly. It was the Claimant's own actions, or inaction, which led to the General Division holding the hearing in his absence. The Claimant did not ask to reschedule until the Friday before the Monday morning hearing, and he did not give any explanation for why he was unable to attend until several hours after the hearing was over.

[20] The Claimant's June 26 request to reschedule had been his first request. He could have asked to have the hearing rescheduled for any reason, or no reason, right up until June 16, 2023. Provided he could make himself available within two weeks of the scheduled date, the General Division would have had no choice but to grant his request. If he had given the Tribunal reasons why he could not attend, there is a good chance the Tribunal would have granted his request even later than June 16, 2023.

[21] Finally, it is hard to see how the General Division decision could have prejudiced the Claimant. Despite his failure to appear for his hearing, the General Division allowed his appeal. There can be no arguable case that the General Division acted unfairly where its actions did not result in actual or potential prejudice to the Claimant.

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<sup>7</sup> See section 58 of the Rules.

<sup>8</sup> See GD6-1.

[22] Perhaps the Claimant wants this appeal to go forward because he believes he will get a final decision more quickly. Perhaps he is hoping that I will deal with whether the Commission overpaid him. But I would be unable to do that.

[23] Even if I allowed the appeal to proceed, I could only decide if the General Division made an error in how it considered the issues arising from the Commission's reconsideration decision.<sup>9</sup>

[24] The Commission had refused to take a second look at whether the Claimant received benefits to which he was not entitled: It did not accept the Claimant's reasons for filing his request to reconsider late.

[25] The only issue in the reconsideration decision that was under appeal was the Commission's refusal to reconsider. The General Division had no jurisdiction to find that the Claimant was not overpaid.

[26] The General Division had to decide whether the Claimant's request was late and whether the Commission acted properly in refusing to consider his request for reconsideration. It allowed the appeal by finding that the Claimant had never received an initial decision from the Commission, so he could not have made a request for reconsideration.

[27] As a result of the General Division decision, the Commission must give him that decision (or decisions). If he does not agree at that point, he can ask for a reconsideration, and appeal if necessary.

[28] There is no arguable case that the General Division acted unfairly by refusing his request to reschedule, proceeding in his absence, and allowing his appeal.

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

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<sup>9</sup> See section 113 of the *Employment Insurance Act*.

## **Conclusion**

[30] I am refusing permission to appeal. This means that the appeal will not proceed.

Stephen Bergen  
Member, Appeal Division