



Citation: *KS v Canada Employment Insurance Commission*, 2023 SST 1415

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

# **Leave to Appeal Decision**

**Applicant:** K. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated July 25, 2023  
(GE-23-1373)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** November 16, 2023

**File number:** AD-23-812

## Decision

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

## Overview

[2] The Applicant (Claimant) worked in healthcare, in an administrative support role. She was placed on an unpaid leave of absence as of December 8, 2021, because she didn't follow her employer's vaccination policy.

[3] When the policy changed and employees were allowed to work even if they were unvaccinated, she asked to come back to work. She was told she could be placed in a pool of temporary workers and could bid on available shifts. She spent the next several months following up with her employer, unsuccessfully, to try to get shifts.

[4] After many months without work, and having spent almost all her savings, she decided to investigate whether she could get Employment Insurance (EI) benefits. On December 1, 2022, she applied for EI benefits.

[5] The Respondent (Commission) reviewed the Claimant's application and decided that she hadn't worked enough hours in her qualifying period to qualify for benefits. When she applied for benefits, she had been off work for almost a year. The Claimant asked that her application be antedated to an earlier date. The Commission refused to antedate her claim. It says she doesn't have good cause for not applying for benefits sooner. The Claimant appealed the reconsideration decision to the General Division.

[6] The General Division found that the Claimant did not prove good cause because she did not act as a reasonable and prudent person would have done in similar circumstances. Therefore, her antedate request was refused.

[7] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. She submits that the General Division did not follow procedural fairness and made an important error of fact.

[8] I must decide whether the Claimant raised some reviewable error of the General Division upon which the appeal might succeed.

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

## **Issue**

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

## **Analysis**

[11] 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:

1. The General Division hearing process was not fair in some way.
2. 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.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[12] 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.

[13] 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 succeed?**

[14] The Claimant submits that the representations of the Commission to the General Division are full of mistakes and contradictions. She puts forward that the agent had a duty of care when filing the representations of the Commission in order not to unnecessarily hurt her claim. He did not fulfill his duty. The Claimant submits that the General Division refused to hear her representations on this point and therefore, did not follow procedural fairness. It made important errors of facts because of its refusal.

**Antedate**

[15] To establish good cause, a claimant must be able to show that they did what a reasonable person in their situation would have done to satisfy themselves as to their rights and obligations under the law.<sup>1</sup>

[16] In view of the Claimant's grounds of appeal, I have carefully reviewed her own written submissions to the General Division.<sup>2</sup>

[17] In her submissions, the Claimant acknowledges that she was put on unpaid leave of absence by her employer in December 2021. The Claimant had two positions with the employer in 2021; only leaving one to best fill the demands of the second position on April 14, 2021.

[18] On March 10, 2022, the employer amended its policy and allowed employees on a leave of absence to return to work by March 31, 2022. On March 22, 2022, not having heard from her employer, she contacted her employer and agreed to be placed back into the casual influenza pool. She was waiting for an offer letter. Given the lack of follow-up by her employer, she reviewed her employment situation and the financial repercussions she had suffered as a result. She called EI as a result in December

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<sup>1</sup> Section 10(4) of the *Employment Insurance Act* (EI Act).

<sup>2</sup> See GD2 and GD5.

2022. She noticed her *Record of Employment* (ROE) did not mention that her contract had ended on January 10, 2022.

[19] The General Division found that the Claimant waited until her savings were depleted to investigate her entitlement to EI benefits in December 2022, even though the terms of her contract indicated that it had ended on January 10, 2022, and that she was told by her supervisor to wait for an offer to go back on the casual influenza pool in March 2022. It found that a reasonable person would not have waited so long. When she finally made her application, she had been without work for nearly a year. The General Division found that a reasonable person would have acted far sooner. It found that there were no exceptional circumstances that would justify such a delay in applying for EI benefits.

[20] It is well established that good faith and ignorance of the law do not in themselves constitute a valid reason to justify the delay in filing a request for EI benefits.<sup>3</sup>

[21] As stated by the General Division, a delay in applying for EI benefits based on an incorrect and unverified assumption that a claimant would not be eligible, or waiting for an employer to issue or to correct a ROE, does not constitute good cause for purposes of the EI Act.<sup>4</sup> The Claimant had a duty to act promptly to inquire about her eligibility to EI benefits, especially when considering the employer was not following up on her return to work after March 31, 2022.

[22] As stated by the General Division, the fact that the Claimant feels she was mistreated and discriminated against by her employer does not alter its conclusion that she did not meet the conditions for her application to be antedated. It's for other forums (in other words, other courts, or tribunals) to decide whether she has a claim against her employer in the circumstances.

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<sup>3</sup> *Albrecht*, A-172-85, *Larouche*, A-644-93, *Carry*, 2005 FCA 367, *Somwaru*, 2010 FCA 336, *Kaler*, 2011 FCA 266, *Mauchel*, 2012 FCA 202.

<sup>4</sup> *Howard v Canada (Attorney general)*, 2011 FCA 116, *Canada (Attorney general) v Innes*, 2010 FCA 341, *Shebib v Canada (Attorney general)*, 2003 FCA 88.

[23] I see no reviewable error made by the General Division on the issue of antedate. The General Division decision is based on the evidence presented before it and contains no error of law.

[24] I must reiterate that it is not permissible for the Appellate Division to draw a different conclusion from that of the General Division based on the same facts given the extent of its jurisdiction and the absence of an error of law, a breach of a principle of natural justice or an arbitrary conclusion of fact.<sup>5</sup>

### **Natural justice**

[25] The Claimant expresses dissatisfaction with the representations of the Commission to the General Division. She argues that they are full of mistakes and contradictions. She puts forward that the agent had a duty of care when filing the representations of the Commission in order not to unnecessarily hurt her claim. He did not fulfill his duty. The Claimant submits that the General Division did not want to hear her representations on this point and therefore, did not follow procedural fairness.

[26] The General Division does not have jurisdiction to investigate the Commission's conduct. The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[27] A fair hearing presupposes adequate notice of the hearing, the opportunity to be heard, the right to know what is alleged against a party and the opportunity to answer those allegations.

[28] Before the General Division, the Claimant had the opportunity to present her version of the events and answer the allegations of the Commission in writing, and orally during the one hour and a half hearing. I see no violation of the principles of natural justice by the General Division.

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<sup>5</sup> *Quadir c Canada (Attorney General)*, 2018 CAF 21.

## Conclusion

[29] After reviewing the appeal file and the General Division's decision as well as considering the Claimant's arguments in support of her request for leave to appeal, I have no choice but to find that the appeal has no reasonable chance of success. The Claimant has not set out a reason, which falls into the above-enumerated grounds of appeal that could possibly lead to the reversal of the disputed decision.

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

Pierre Lafontaine  
Member, Appeal Division