



Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 1761

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: L. M.
Representative: J. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 13, 2022
(GE-21-2484)

Tribunal member: Solange Losier

Decision date: December 7, 2023

File number: AD-23-906 & AD-23-935

Decision

[1] An extension of time to apply to the Appeal Division is granted.

[2] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[3] L. M. is the Claimant. She worked as a lead hand in a cafeteria for a school. She applied for and received Employment Insurance (EI) regular benefits when she temporarily stopped working in 2017 and 2018.

[4] The Canada Employment Insurance Commission (Commission) retroactively decided that she was not entitled to get EI regular benefits because she voluntarily took a period of leave from her job without just cause from April 17, 2017 to July 4, 2017 and April 17, 2018 to July 6, 2018.¹ This resulted in an overpayment. The Claimant appealed the Commission's reconsideration decisions to the General Division.

[5] The General Division also concluded that the Claimant voluntarily took two periods of leave from her job in 2017 and 2018 without just cause.² Because of that, she was not entitled to get EI regular benefits.³

[6] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.⁴ She argues that the General Division decided something that it did not have the power to decide resulting in an error of jurisdiction. She says that only a higher platform or court can decide and conclude it was a fair and reasonable outcome for both parties.⁵

¹ There are two Appeal Division files: AD-23-906 and AD-23-935. I have joined both files because they involve the same legal issue, but simply different periods of time (2017 and 2018). Section 35 of the *Social Security Tribunal Rules of Procedures* (SST Rules) allows for the Tribunal to join files where the appeals raise a common question and joining the appeals is not unfair to the parties.

² See General Division decision at pages ADNN1A-1 to ADNN1A-15.

³ See section 32(1) of the *Employment Insurance Act* (EI Act) results in a "disentitlement" to EI benefits when a claimant takes a period of leave without just cause.

⁴ See application to the Appeal Division at pages ADNN1-1 to ADNN1-7.

⁵ See page ADNN1-3.

[7] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.⁶

Issues

[8] The issues in this appeal are:

- a) Was the application to the Appeal Division late?
- b) If so, should I extend the time for filing the application?
- c) Is there an arguable case that the General Division made an error of jurisdiction?

The application to the Appeal Division was filed late – more than 30 days, but less than one year

[9] The General Division decision is dated May 12, 2022.⁷ The Tribunal received the Claimant's application to the Appeal Division on October 2, 2023.⁸

[10] At first glance, it looked like the Claimant's application to the Appeal Division was submitted over a year late. It is important to know that the Tribunal cannot allow an extension of time for appeals that are made more than one year after the day the decision and reason are communicated in writing.⁹

[11] I reviewed the Claimant's application to the Appeal Division further to see when the General Division's decision was communicated to her. In her appeal forms, she wrote that the General Division decision was communicated to her on May 13, 2022 (which is one day after it was issued).¹⁰

⁶ See section 58(2) of the *Department of Employment and Social Development (DESD Act)*. I have refuse leave to appeal if I am satisfied that the appeal has no reasonable chance of success.

⁷ See General Division decision at pages ADNN1A-1 to ADNN1A-15.

⁸ See application to the Appeal Division at pages ADNN1-1 to ADNN1-7.

⁹ See section 57(2) of the DESD Act.

¹⁰ See page ADNN1-2.

[12] The deadline to file an application to the Appeal Division in the prescribed form and manner is 30 days after the day on which the General Division decision was communicated to her in writing.¹¹

[13] Since the Claimant says that the General Division decision was communicated to her on May 13, 2022, then the 30 days starts counting from the following day on May 14, 2022.

[14] This means that the 30 day deadline to file her application to the Appeal Division was June 13, 2022. The one year deadline would have been May 15, 2023.¹²

[15] The Claimant argues to the Appeal Division that she filed her application to the Appeal Division after the 30 day deadline, but before the one year deadline (which she understood was May 13, 2023).¹³

[16] The file does in fact show proof that the Claimant previously sent the Tribunal an email on May 11, 2023 asking for her appeal to be accepted.¹⁴ While the Claimant did not submit the standard appeal forms at that time, the contents of her email clearly show that she was appealing the General Division decision and provide an explanation for its lateness.

[17] Unfortunately, the Tribunal did not open a file for the Claimant until October 2, 2023 when she submitted the standard forms that are usually used to apply to the Appeal Division.¹⁵

[18] I find that the Claimant filed her notice of appeal to the Appeal Division on May 11, 2023, which was before the one year deadline on May 15, 2023. I am relying on the email she sent to the Tribunal on May 11, 2023 because it shows that she was

¹¹ See section 57(1)(a) of the DESD Act.

¹² May 14, 2023 is a Sunday, so it is moved by one day to May 15, 2023. Also, see section 28 of the *Interpretation Act*.

¹³ See page ADNN1-5.

¹⁴ See pages ADNN1B-1 to ADNN1B-5.

¹⁵ See application to the Appeal Division at pages ADNN1-1 to ADNN1-7.

appealing the General Division's decision, even if she didn't use the standard appeal forms.

I am extending the time for filing the application because the Claimant has a reasonable explanation

[19] I can give more time to appeal if the Claimant provides a reasonable explanation for why she was late.¹⁶

[20] The Claimant had provided a detailed explanation for filing her appeal late.¹⁷ She says it has been a difficult year because of the Covid-19 pandemic. She also retired from work, relocated to another city and visited family in the U.S.A for several months. As well, she had some technical issues and was unable to get internet service where she was living.

[21] I am granting the Claimant an extension of time to file her appeal because I find that the Claimant has provided a reasonable explanation for why her appeal was late.

Analysis

[22] An appeal can proceed only if the Appeal Division gives permission to appeal.¹⁸

[23] I must be satisfied that the appeal has a reasonable chance of success.¹⁹ This means that there must be some arguable ground upon which the appeal might succeed.²⁰

[24] I can only consider certain types of errors. I have to focus on whether the General Division could have made one or more of the relevant errors (this is called the "grounds of appeal").²¹

¹⁶ See sections 27(1) and 27(2) of the SST Rules.

¹⁷ See page ADNN1B-2.

¹⁸ See section 56(1) of the DESD Act.

¹⁹ See section 58(2) of the DESD Act.

²⁰ See *Osaj v Canada (Attorney General)*, 2016 FC 115.

²¹ See section 58(1) of the DESD Act.

[25] The possible grounds of appeal to the Appeal Division are that the General Division did one of the following:²²

- proceeded in a way that was unfair
- acted beyond its powers or refused to exercise those powers
- made an error in law
- based its decision on an important error of fact

[26] For the appeal to proceed to the next step, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

– **The Claimant argues that the General Division made an error of jurisdiction**

[27] The Claimant argues that the General Division decided something that it did not have the power to decide resulting in an error of jurisdiction.²³

[28] I have summarized the Claimant's main points:²⁴

- During the summer months many staff are temporarily laid off from work from April until around August
- There is a legally binding collective agreement in place at work
- One clause in the collective agreement allows for reverse seniority layoffs that permit employees to elect to be laid off in order of seniority
- She was simply following the collective agreement when she elected to be laid off
- Many other employees use the same collective agreement clause without interference from the Commission

²² See section 58(1) of the DESD Act.

²³ See section 58(1)(a) of the DESD Act.

²⁴ See page ADNN1-3.

- She has experienced stress, hardship, humiliation and harassment simply because for following her collective agreement
- The Commission has also confiscated numerous tax refunds and GST cheques, which they had no legal right to take
- The General Division decided something that it didn't have the power to decide because only a higher platform or court can decide and conclude this is a fair and reasonable outcome for both parties

– **There is no arguable case that the General Division made an error of jurisdiction**

[29] An error of jurisdiction means that the General Division didn't decide an issue it had to decide or decided an issue it did not have the authority to decide.²⁵

[30] The Commission retroactively decided that the Claimant was disentitled from getting EI regular benefits for two periods: April 17, 2017 to July 4, 2017 and April 17, 2018 to July 6, 2018. As noted above, these are the decisions the Claimant appealed to the General Division.

[31] The General Division's jurisdiction comes from the *Employment Insurance Act* (EI Act). It says that a party who is dissatisfied with a decision made by the Commission (under section 112 of the EI Act) can appeal to the Tribunal.²⁶

[32] This means that the General Division had to decide whether the Claimant voluntarily took a period of leave from her job on April 17, 2017 to July 4, 2017 and April 17, 2018 to July 6, 2018. It also had to decide whether she had just cause to take those periods of leave.

[33] It is not arguable that the General Division made a jurisdictional error when it decided the issue of voluntary period of leave for the following reasons.

²⁵ See section 58(1)(a) of the DESD Act.

²⁶ See sections 112 and 113 of the EI Act.

[34] The General Division's decision shows that it only decided the issues it was allowed to decide. It did not decide any issues that it did not have the authority to decide.

[35] The law says that just cause for voluntarily leaving an employment or taking a leave from employment exists if the Claimant had no reasonable alternative to leaving or taking the leave, having regard to all the circumstances.²⁷ This is the legal test.

[36] The law also says that a claimant who takes a period of leave from their job without just cause is not entitled to receive EI benefits, if before or after the beginning of the period of leave, it was authorized by the employer and the claimant and employer agreed as to the date on which the claimant would resume employment.²⁸

[37] The General Division correctly identified the law and legal test in its decision.²⁹

[38] The General Division decided that the Claimant had voluntarily taken two periods of leave from her job without just cause, so she was not entitled to get EI benefits.³⁰ It found that the Claimant had a choice to stay or leave in 2017 and 2018.³¹ It said that the Claimant did not dispute that she chose to volunteer to be laid off from work.³²

[39] The General Division then considered whether the Claimant had just cause to take the periods of leave in 2017 and 2018. It considered the following circumstances: adherence to the provisions of her collective agreement, a significant modification to the terms and conditions respecting wages and salary and significant change in duties.³³

²⁷ See section 29(c) of the EI Act.

²⁸ See section 32 of the EI Act.

²⁹ See paragraphs 9-11 and 20-22 of the General Division decision.

³⁰ See paragraph 18 of the General Division decision.

³¹ See paragraph 10 of the General Division decision.

³² See paragraph 17 of the General Division decision.

³³ See paragraphs 22-23 of the General Division decision and sections 29(c)(vii) and 29(c)(ix) of the EI Act.

[40] The General Division was aware of the Claimant's argument that there was a collective agreement in law place that allowed her to elect to be voluntarily laid off first.³⁴

[41] However, it rejected that argument finding that while the Claimant is entitled to exercise her collective agreement rights and elect to be laid off first, that the provisions in the collective agreement do not supersede the EI Act.³⁵

[42] The General Division correctly stated that the employer and Claimant cannot negotiate away the requirements and protections that are part of the EI Act.³⁶ The collective agreement is not law, it is an employment contract between the employer and employees.

[43] The General Division also rejected that there was a significant modification of terms and conditions respecting salary or wages because it found that the Claimant would have worked the vast majority as a lead hand with no impact to her wage rate.³⁷ It also said there was no significant changes to work duties because she was the lead hand for cashiers, so she knows the cashier role and is qualified to perform it.

[44] The General Division concluded that the Claimant didn't have just cause to take a period of leave in 2017 and 2018 after considering the Claimant's specific circumstances, including those circumstances that are outlined in the law.³⁸ It found that there were reasonable alternatives such as, continuing to work instead of electing a voluntary lay off or she could have elected to "bump" another employee and worked as either a lead hand or cashier given her seniority.³⁹

³⁴ See paragraphs 12-14 of the General Division decision.

³⁵ See paragraph 27 of the General Division decision.

³⁶ See paragraph 27 of the General Division decision.

³⁷ See paragraph 54 of the General Division decision.

³⁸ See paragraphs 54 and 58 of the General Division decision and sections 29(c)(vii) and 29(c)(ix) of the EI Act.

³⁹ See paragraph 62 of the General Division decision.

[45] One the main arguments that the Claimant is raising is that the General Division didn't make a decision that was fair or reasonable for both parties and that only a higher platform or court can do this.

[46] The Tribunal has jurisdiction to hear appeals that deal with the *Employment Insurance Act*. In this case, the General Division had to decide whether or not the Claimant had just cause to voluntarily take a period of leave from her job in 2017 and 2018. The General Division is the "trier of fact" which means it had to make findings and a decision based on the facts and evidence before it. That is exactly what it did.

[47] In some cases, a party might be dissatisfied with the General Division's decision and find it unfair or unreasonable. But, a disagreement with the outcome isn't enough for me to intervene.

[48] The Appeal Division's role is limited to determining whether the General Division made a specific type of error or errors.⁴⁰ This means I can't conduct a rehearing and reweigh the evidence in order to reach a different outcome for the Claimant.⁴¹

[49] The General Division and Appeal Division have no jurisdiction to stop the collection of the Claimant's tax refunds or GST.

[50] It is not arguable that the General Division made an error of jurisdiction. The General Division only decided the issues it had the power to decide. The Claimant's arguments amount to a disagreement with the outcome. There is no reasonable chance of success on this ground.

⁴⁰ See section 58(1) of the DESD Act.

⁴¹ See *Tracey v Canada (Attorney General)*, 2015 FC 1300 and *Cameron v Canada (Attorney General)*, 2018 FC 100.

– **There are no other reasons for giving the Claimant permission to appeal**

[51] There is no arguable case that the General Division made any other reviewable error.⁴² I reviewed the file and examined the General Division decision.⁴³ I did not find any relevant evidence that the General Division might have ignored or misinterpreted.

Conclusion

[52] An extension of time is granted to file the appeal. However, permission to appeal is refused. This means that the appeal will not proceed.

Solange Losier
Member, Appeal Division

⁴² See section 58(1) of the DESD Act.

⁴³ The Federal Court has said that I should do this in decisions like *Griffin v Canada (Attorney General)*, 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615.