



Citation: *AM v Canada Employment Insurance Commission and X*, 2024 SST 275

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: A. M.

Respondent: Canada Employment Insurance Commission
Representative: Isabelle Thiffault

Added Party: X

Decision under appeal: General Division decision dated June 12, 2023
(GE-23-208)

Tribunal member: Solange Losier

Type of hearing: In Writing

Decision date: March 19, 2024

File number: AD-23-619

Decision

[1] The appeal is allowed. The Claimant was misinformed by Tribunal staff which led her to not attend the General Division hearing. The General Division made an error when it proceeded her absence.

[2] The matter will go back to the General Division for reconsideration.

Overview

[3] A. M. is the Claimant in this case.¹ I will refer to her as the Claimant throughout this decision. When she stopped working she applied for Employment Insurance (EI) regular benefits.

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant wasn't allowed to get EI benefits due to misconduct. On reconsideration, the Commission changed their decision in favour of the Claimant.² This meant that the Claimant was allowed to get EI benefits from July 17, 2022.

[5] However, the Claimant's former Employer appealed the Commission's reconsideration decision to the General Division of the Tribunal. The Employer argued that the Claimant was dismissed for misconduct, so they submit that she wasn't entitled to get EI benefits.

[6] The General Division allowed the Employer's appeal. It concluded that the Claimant lost her job due to misconduct, so she was not entitled to get EI benefits.³ Only the Employer attended the General Division hearing. It proceeded in the absence of the Commission and the Claimant because the General Division was satisfied that the parties got notice of the hearing.

¹ The Claimant is the one who appealed to the Appeal Division, so she is also the "Appellant."

² See reconsideration decision at pages GD3-213 to GD2-214.

³ See General Division decision at pages AD1A-1 to AD1A-13 and section 30(1) of the *Employment Insurance Act* (EI Act).

[7] The Claimant appealed the General Division's decision to the Appeal Division of the Tribunal (she is the Appellant in the Appeal Division proceedings). She argues that the General Division made several errors, including that it didn't follow a fair process, made an error of jurisdiction and an error of fact.⁴ The Employer is the Added Party for the Appeal Division proceedings.

[8] I am allowing the Claimant's appeal. The matter will return to the General Division for reconsideration.

Preliminary matters

– The parties agreed to have the Appeal Division hearing proceed in-writing

[9] The Tribunal will usually hold the hearing based on the choice selected by the Appellant.⁵ However, there are some circumstances where the Tribunal may hold a hearing, in whole or in part, in a format other than the one requested by the Appellant.⁶

[10] The Claimant (also, the Appellant) asked the Tribunal for an in-writing hearing.⁷

[11] I decided to schedule a case conference to further discuss the options available for holding a hearing, particularly since there were a few parties involved.⁸

[12] Only the Commission and Employer attended the case conference.⁹ They both agreed to the Claimant's request for an in-writing hearing. Afterwards, I sent the parties a written summary of what was discussed at the case conference.¹⁰

[13] This followed by a letter advising the parties that I accepted what they agreed to: an in-writing hearing.¹¹

⁴ See application to the Appeal Division at pages AD1-1 to AD1-7 and pages AD6-1 to AD6-3.

⁵ See section 2(2) of the *Social Security Tribunal Regulations* (SST Regulations).

⁶ See section 2(3) of the SST Regulations.

⁷ See page AD1-4.

⁸ See case conference invitation at pages AD0-1 to AD0-2.

⁹ See email from Claimant advising that she would not be attending the case conference at page AD4-1.

¹⁰ See case conference summary at pages AD7-1 to AD7-3.

¹¹ See Tribunal letter dated January 15, 2024.

– **I am accepting the Claimant’s new evidence**

[14] The Claimant submitted new evidence in her application to the Appeal Division and written submissions.¹²

[15] The Claimant wrote that one week prior to the General Division hearing, Tribunal staff called her and said that her participation in the hearing would have no bearing on the decision made.¹³ She says that she specifically asked if her presence at the hearing would have any impact. She says that Tribunal staff told her that the decision would be based on all evidence previously submitted, that no new information or evidence would be presented and that the decision would not be impacted by her attendance.

[16] The Claimant says she didn’t attend the General Division hearing under the belief she wouldn’t be penalized. She says that the information she was provided by Tribunal staff led her to not attend and it was procedurally unfair for the General Division to proceed with the hearing and render a decision.

[17] I previously gave the Claimant permission to appeal because she had an arguable case.¹⁴ Given the nature of the Claimant’s allegation, I also included the Tribunal’s telephone conversation logs and “Registry Officer Reminder Call Checklist” (checklist) between the Claimant and Tribunal staff. These documents were added to the Appeal Division file and shared with the parties because it was relevant to the alleged breach of natural justice.¹⁵

[18] The Appeal Division normally doesn’t accept new evidence, but if the evidence is about a “procedural defect” then it would fall under one of the exceptions.¹⁶

[19] I am allowing the new evidence about what Tribunal staff allegedly told the Claimant in a telephone call prior to the General Division hearing. I am also allowing the

¹² See pages AD1-3 to AD1-7 and AD6-2.

¹³ See pages AD1-3 to AD1-7 and AD6-2.

¹⁴ Permission to appeal was granted on November 15, 2023. The Commission asked for my reasons for granting appeal, see page AD2-1. I issued my reasons on November 30, 2023.

¹⁵ See pages AD3-1 to AD3-9.

¹⁶ See *Sharma v Canada (Attorney General)*, 2018 FCA 48; and *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

telephone logs and checklist in as new evidence. I find that the new evidence above falls under one of the exceptions because it is about a procedural defect.

– **I decided that the parties could ask the Claimant questions about the new evidence in-writing (i.e., written cross-examination of the new evidence)**

[20] A party alleging that the General Division didn't follow a fair process would typically testify at the Appeal Division hearing. The other parties would have a chance to ask that party questions about that evidence.

[21] Because the hearing proceeded in-writing on consent of the parties, I allowed the other parties (that is, the Commission and the Employer) to ask the Claimant questions about the new evidence, in-writing.

[22] Specifically, the Commission and Employer were permitted to ask the Claimant questions about what she had said Tribunal staff told her in that telephone call. This followed by a period where the Claimant would respond to any questions in-writing. Finally, all the parties would be able to provide final written submissions.

[23] I provided all the details about the process and deadlines in-writing to the parties in the notice of hearing.¹⁷ None of the parties raised any concerns or objected to the above approach for the Appeal Division hearing.

[24] I note that neither the Commission nor the Employer wrote in with any questions for the Claimant about the alleged procedural fairness issue. The Employer did write in, but simply restated their position on the misconduct issue and said that they didn't have any comment about the procedural fairness issue.¹⁸

[25] The Claimant and Employer provided final written submissions.¹⁹ The Commission had previously told the Tribunal that they would be relying on the submissions they provided at an earlier date.²⁰

¹⁷ See notice of hearing letter dated January 15, 2024 at page AD00.

¹⁸ See pages AD1-1 to AD1-2.

¹⁹ See pages AD8-1 to AD8-2 and AD10-1 to AD10-2.

²⁰ See pages AD5-1 to AD5-4.

Issues

[26] The issues in this appeal are:

- a) Did the General Division make a reviewable error?
- b) If so, how should the error be fixed?

Analysis

[27] The Appeal Division can only intervene if the General Division made certain types of errors.²¹

[28] 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.

[29] The Claimant argues that the General Division didn't follow a fair process when it proceeded with the hearing in her absence and rendered a decision.²³ She also says it made an error of jurisdiction and important errors of fact.

[30] I can intervene in the General Division decision if a reviewable error is established.²⁴

²¹ See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) that lists the "grounds of appeal".

²² See section 58(1) of the DESD Act.

²³ See page AD1-3.

²⁴ See section 59(1) of the DESD Act.

– **The Claimant was misinformed by Tribunal staff and it led her to not attend the General Division hearing**

[31] The principles of natural justice are about procedural fairness. The right to a fair hearing before the Tribunal includes certain procedural protections such as the right to an unbiased decision maker, the right of a party to know the case and to be given an opportunity to respond to it, etc.

[32] The Claimant says that one week prior to the General Division hearing, she received a call from Tribunal staff who told her that her participation in the hearing would have no bearing on the decision; that the decision would be based on all evidence previously submitted; that no new information or evidence would be presented and that the decision would not be impacted by her attendance.²⁵ Because of this, the Claimant said that she believed she wouldn't be penalized if she didn't attend the General Division hearing.

[33] The Commission agrees that the Claimant may have been misinformed by Tribunal staff about the importance of attending the General Division hearing.²⁶ It says that if the Claimant had attended the hearing and testified, then it may have led to a different decision at the General Division.

[34] As noted above, the Employer didn't have any comment about the procedural fairness issue.²⁷

[35] I find that the Claimant didn't receive a fair process when the General Division proceeded in her absence. She did not attend the General Division hearing because of misinformation she received from Tribunal staff.²⁸

[36] I looked at the new evidence, specifically the telephone conversation logs between the Claimant and various Tribunal staff. There are eleven telephone logs in total. Nine telephone conversations happened before the General Division hearing. The

²⁵ See page AD1-3.

²⁶ See pages AD5-1 to AD5-4.

²⁷ See pages AD1-1 to AD1-2.

²⁸ See section 58(1)(a) of the DESD Act.

remaining two telephone conversations happened after the General Division hearing took place.

[37] There is a telephone log and checklist dated May 17, 2023, which is exactly one week before the General Division hearing took place on May 24, 2023.²⁹

[38] In the telephone log from May 17, 2023, Tribunal staff noted the following. It says that it spoke with the Claimant for the customary hearing reminder call. It took note that the Claimant wasn't sure she would attend as she doesn't want to go through with it because it is stressful. Lastly, it says that it explained the appeal process to her and referred to the checklist for further details.

[39] The checklist that followed the telephone log shows that the call with the Claimant took place on May 17, 2023 at 9:55am and lasted for around 9 minutes.³⁰ It is a standard checklist that Tribunal staff use to provide information to parties, including reminding them of the date and time of the hearing, explaining how to connect into the hearing, ensuring that documents are received and explaining what to expect and how the hearing will unfold, etc. The Tribunal staff checked off the relevant boxes in the checklist, including what to expect at the hearing and how the hearing will unfold, suggesting that information was provided.

[40] At the bottom of the checklist, there is also space for additional comments. It says: "The Claimant may not participate. She said that if she hasn't dialed in to continue the hearing without her, and not reschedule."

[41] Looking at both the telephone log and checklist from May 17, 2023, there is no note or any indication that the Claimant was told that her participation in the hearing would have no bearing on the decision made, or that the decision would be impacted by her attendance.

[42] Even so, I have given significant weight to the fact that the telephone log is not an exact transcript of the discussion that may have taken place between the Claimant

²⁹ See pages AD3-5 to AD3-8.

³⁰ See pages AD3-5 to AD3-8.

and Tribunal staff. It is simply a summary prepared by Tribunal staff, so there is a possibility that some information is missing, including what the Claimant says she was told about the General Division hearing.

[43] I have also given weight to the Claimant's own evidence, which I found was detailed. She provided the date of the call (one week prior to the hearing) and that is consistent with the telephone log dated May 17, 2023. She also provided detailed evidence about what Tribunal staff told her.

[44] There is another telephone log dated June 13, 2023 after the hearing took place and the decision was issued that is relevant here.³¹ It says that the Claimant called the Tribunal saying that there were mistakes in the [General Division] decision. Tribunal staff noted in the telephone log that the Claimant said she was told that her attendance would have no influence on the Tribunal Member's decision and that pushed her to not attend.

[45] This subsequent telephone note from June 13, 2023 supports the Claimant's assertion that she was provided with misinformation by Tribunal staff from the outset.

[46] I have also considered that the Commission, nor the Employer appear to dispute that the Claimant may have been provided with misinformation leading her to not attend the General Division hearing.

[47] For these reasons, I find the Claimant didn't receive a fair process when she was misinformed by Tribunal staff and it led her to not attend the hearing.³² The General Division proceeded in her absence, so she did not get an opportunity to attend the hearing and present her case.

[48] I respectfully acknowledge that when the General Division proceeded in her absence, it would not have known that Tribunal staff misinformed the Claimant. Because there is no indication in the telephone logs or checklist that she had been provided with misinformation that might lead her to not attend the General Division

³¹ See page AD3-9.

³² See section 58(1)(a) of the DESD Act.

hearing. Even so, the Claimant is entitled to a fair process and if had she been told the importance of attending the General Division hearing, she might have chosen to attend and present her case.

[49] It is not necessary to address any of the other alleged errors raised by the Claimant because I have found one error.

– **The General Division doesn't have the power to compel (or force) another party to produce evidence**

[50] I want to briefly address an argument that the Claimant has raised in her submissions to the Appeal Division.³³ She argues that the General Division erred because it didn't consider the fact that she could not obtain evidence that was only available within the Employer's possession.

[51] The Appeal Division's mandate is limited to determining whether the General Division made a reviewable error.³⁴ The Claimant's argument that she was unable to obtain evidence from the Employer is not a reviewable error. The General Division doesn't have the power to compel another party to produce evidence. Neither does the Appeal Division.

Fixing the error

[52] There are two options for fixing an error.³⁵ I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.

[53] The parties don't agree on how the error should be fixed.

[54] The Claimant doesn't want the case to go back to the General Division because she wants me to make the decision and render it in her favour.³⁶ More specifically, she argues that she would be disadvantaged if the case is returned to the General Division.

³³ See pages AD1-3; AD6-1 to AD6-3 and AD10-1 to AD10-2.

³⁴ See *Marcia v Canada (Attorney General)*, 2016 FC 1367; *Parchment v Canada (Attorney General)*, 2017 FC 354 and section 58(1) of the DESD Act.

³⁵ See section 59(1) of the DESD Act.

³⁶ See pages AD10-1 to AD10-2.

She says that the absence of crucial evidence impedes her ability to adequately defend the allegations made against her.

[55] The Commission says that the case should be returned to the General Division because it would allow the Claimant to provide additional information.³⁷ It highlights the fact that the Appeal Division cannot hear new evidence and the missing information from the Claimant could lead to a different outcome.

[56] The Employer didn't address how they wanted the error fixed.³⁸

– **The matter will return to the General Division for reconsideration**

[57] I find that this matter must return to the General Division for reconsideration because the record is not complete. The Claimant did not attend the General Division hearing and so she didn't have an opportunity to testify. So, the matter will return to the General Division for a new hearing.

Conclusion

[58] The appeal is allowed. The Claimant was misinformed by Tribunal staff which led her to not attend the General Division hearing. The General Division made an error when it proceeded her absence.

[59] The matter will return to the General Division for reconsideration.

Solange Losier
Member, Appeal Division

³⁷ See pages AD5-1 to AD5-4.

³⁸ See pages AD8-1 to AD8-2.