



Citation: *MM v Canada Employment Insurance Commission*, 2024 SST 123

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** M. M.  
**Representative:** Tisha Alam

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Jessica Earles

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**Decision under appeal:** General Division decision dated July 28, 2023  
(GE-23-236)

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**Tribunal member:** Solange Losier

**Type of hearing:** Videoconference  
**Hearing date:** February 1, 2024  
**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** February 9, 2024  
**File number:** AD-23-957

## Decision

[1] The appeal is allowed. The matter will go back to the General Division for reconsideration to decide the late appeal issue.

## Overview

[2] M. M. is the Claimant in this case. She applied for Employment Insurance (EI) regular benefits.

[3] The Commission decided that the Claimant voluntarily left her job without just cause.<sup>1</sup> Because of that, it decided that the Claimant was not entitled to get EI benefits. The Claimant appealed that decision to the Tribunal's General Division.<sup>2</sup>

[4] The General Division decided that the Claimant's appeal could not move forward because it was filed late.<sup>3</sup> It found that she had not provided a reasonable explanation for the delay.<sup>4</sup>

[5] The Claimant appealed the General Division decision to the Appeal Division.<sup>5</sup> She was given permission to appeal because she had an arguable case that the General Division made a reviewable error.<sup>6</sup>

[6] I have found that the General Division made an error of law and an important error of fact.<sup>7</sup> Because of this, I am allowing the appeal. The matter will return to the General Division for reconsideration.

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<sup>1</sup> See reconsideration decision at page GD3-37.

<sup>2</sup> See pages GD2-1 to GD2-7.

<sup>3</sup> See General Division decision at pages AD1A-1 to AD1A-5.

<sup>4</sup> See paragraph 24 of the General Division decision.

<sup>5</sup> See application to the Appeal Division at pages AD1-1 to AD1-5.

<sup>6</sup> See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

<sup>7</sup> See section 58(1)(c) of the DESD Act.

## The Claimant has new evidence

[7] New evidence is evidence that the General Division did not have before it when it made its decision.

[8] The Appeal Division generally does not accept new evidence.<sup>8</sup> This is because the Appeal Division isn't the fact finder or rehearing the case. It is a review of the General Division based on the same evidence.<sup>9</sup>

[9] The Appeal Division generally does not accept new evidence, but there are some exceptions.<sup>10</sup> For example, I can accept new evidence if it provides one of the following:

- general background information only
- if it highlights findings made without supporting evidence
- shows that the Tribunal acted unfairly

[10] At the Appeal Division hearing, the Claimant provided reasons about why her appeal to the General Division was late. The Commission did not object to this evidence and did not have any questions for the Claimant.

[11] I find that the Claimant's testimony about why her appeal was late is new evidence that was not before the General Division. This new evidence does not meet any of the above exceptions. Specifically, it does not provide general background information, or highlight findings made without supporting evidence, or show that the Tribunal acted unfairly. As a result, I cannot accept it.

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<sup>8</sup> See *Tracey v Canada (Attorney General)*, 2015 FC 1300 at paragraphs 29 and 34; *Parchment v Canada (Attorney General)*, 2017 FC 354, at paragraph 23.

<sup>9</sup> See *Gittens v Canada (Attorney General)*, 2019 FCA 256, at paragraph 13.

<sup>10</sup> See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraphs 37 and 39.

## Issues

[12] The issues in this appeal are:

- a) Did the General Division make an error of law when it decided that the Claimant's appeal was late?
- b) Did the General Division make an important error of fact about the date the Claimant filed her appeal with the Tribunal?
- c) If so, how should the error be fixed?

## Analysis

[13] An error of law can happen when the General Division does not apply the correct law, or uses the correct law but misunderstands what it means or how to apply it.<sup>11</sup>

[14] An error of fact happens when the General Division bases its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.<sup>12</sup>

[15] This involves considering some of the following questions:<sup>13</sup>

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

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<sup>11</sup> See section 58(1)(b) of the DESD Act.

<sup>12</sup> See section 58(1)(c) of the DESD Act.

<sup>13</sup> This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

[16] I can intervene in the General Division decision if it made any of the above reviewable errors.<sup>14</sup>

### **The Claimant says the General Division made important errors of fact**

[17] The Claimant argues that the General Division two important errors of fact in its decision.

[18] First, she says that the General Division did not make a determination on when the reconsideration decision was communicated to her and it needed to do that.

[19] She argues that the General Division could have made such a finding based on previous case law from the Federal Court.

[20] She says that the General Division could have also relied on the *Social Security Tribunal Rules of Procedure* (SST Rules) about when documents are received, which is generally ten days after the day it was sent (this is when the Tribunal sends a document to a party by regular mail, it is considered received ten days after the day it was sent).<sup>15</sup>

[21] Second, the Claimant says that the second error happened when the General Division found she had filed her Notice of Appeal on December 20, 2022.<sup>16</sup> She argues that the General Division made this finding, but didn't explain it.

[22] The Claimant also referred to the SST Rule that says a document is considered filed on the date the Tribunal received it.<sup>17</sup>

[23] She points to the Notice of Appeal which is marked as having been filed with the Tribunal on January 17, 2023 and not December 20, 2022 as the General Division said.<sup>18</sup>

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<sup>14</sup> See section 59(1) of the DESD Act.

<sup>15</sup> See section 22 of the *Social Security Tribunal Rules of Procedure* (SST Rules).

<sup>16</sup> See paragraph 6 of the General Division decision.

<sup>17</sup> See section 19(2) of the SST Rules.

<sup>18</sup> See Notice of Appeal to the General Division at pages GD2-1 to GD2-7.

## **The Commission says the General Division didn't make any errors**

[24] The Commission doesn't agree and says that the General Division didn't make any errors and its conclusion was reasonable.

[25] First, the Commission says that the General Division didn't have enough information to decide when the reconsideration decision was communicated. It submits that the General Division did everything it could to try to get an explanation for why the appeal was late. It had to make a decision using the information on file.

[26] Second, the Commission says that the Claimant is the one who has to explain why she was late filing her appeal, according to the SST Rules.<sup>19</sup>

[27] The Commission points out that the appeal form provides an opportunity to identify the date the reconsideration was communicated, or to say that she didn't remember the date.<sup>20</sup> As well, a letter was sent by the Tribunal to her representative asking for an explanation, but the Tribunal received no reply.<sup>21</sup>

## **The General Division made an important error of fact and an error of law**

[28] The law says that an Appellant has 30 days to appeal a decision made under the *Employment Insurance Act* to the General Division after the day on which it was communicated to the Appellant.<sup>22</sup>

[29] The General Division didn't apply the 30-day time limit to determine whether or not the appeal had been filed late from the date the Commission's decision was communicated to the Appellant.

[30] In addition, the General Division's reasons supporting why it found that the appeal had been filed late are insufficient. It isn't clear how the General Division came

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<sup>19</sup> See section 27 of the SST Rules.

<sup>20</sup> See section 6 on page GD2-2.

<sup>21</sup> See letter sent to Claimant's representative at pages GD6-1 to GD6-3.

<sup>22</sup> See section 52(1)(a) of the DESD Act and section 24(3) of the SST Rules.

to that conclusion since there was no determination as to when the Commission's decision was communicated to the Appellant nor when the 30-day time limit started to count.<sup>23</sup>

[31] This means that the General Division had to first decide when the reconsideration decision was communicated to the Claimant in order to decide if the appeal was late. Once that communication date was established, then the 30-day period starts to count.

[32] The General Division also found that the Claimant's Notice of Appeal was filed with the Tribunal on December 20, 2022.<sup>24</sup> It does not explain how it came to this finding.

[33] The Tribunal notifies an appellant when it receives their notice of appeal.<sup>25</sup> Any documents filed with the Tribunal are considered filed on the date the Tribunal receives it and each document is stamped with the date of receipt.<sup>26</sup>

[34] The Tribunal stamped the Claimant's Notice of Appeal as being received on January 17, 2023.<sup>27</sup>

[35] The General Division made an error of fact when it found that December 20, 2022 was the date she filed the appeal with the Tribunal. This appears to be the date she signed the Notice of appeal.<sup>28</sup> The evidence in the file shows that the Tribunal only received the Claimant's Notice of Appeal on January 17, 2023 which the General Division did not consider.

[36] As a result, I find that the General Division erred in law because it did not apply the 30-day time limit from the date of communication of the Commission's reconsideration decision and did not provide adequate reasons allowing us to

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<sup>23</sup> See paragraph 18 of the General Division decision.

<sup>24</sup> See paragraph 5 of the General Division decision.

<sup>25</sup> See section 24(4) of SST Rules.

<sup>26</sup> See sections 19(2) of SST Rules.

<sup>27</sup> See Notice of Appeal to the General Division at pages GD2-1 to GD2-7.

<sup>28</sup> See Notice of Appeal to the General Division and Claimant's signature at page GD2-6.

understand why it found the appeal had been filed late. In addition, the General Division made an incorrect finding of fact about the date the Claimant filed her appeal with the Tribunal based on the evidence in the file.

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

[37] There are two options for fixing an error by the General Division.<sup>29</sup> I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.

[38] To give the decision that the General Division should have given, the record needs to be complete. If I substitute with my own decision I am allowed to make necessary findings of fact.<sup>30</sup>

[39] However, if the record is incomplete, then the case should be sent back to the General Division for reconsideration.

[40] The Commission and Claimant agree that, if there is an error, I should refer the file back to the General Division for reconsideration in order to proceed with the underlying issue which they submit is, voluntary leave.

[41] I agree in part with the Commission and Claimant about how to fix the error. I am sending this matter back to the General Division because the record is not complete. However, I cannot substitute my own decision about the late appeal.

[42] The General Division cannot decide the voluntary leave issue without first deciding the late appeal issue. So, the matter will go back to the General Division for reconsideration on the late appeal issue.

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<sup>29</sup> See section 59(1) of the DESD Act.

<sup>30</sup> See section 64 of the DESD Act.



## **Conclusion**

[43] The appeal is allowed. The General Division made an error of law and an error of fact. The matter will return to the General Division for reconsideration.

Solange Losier  
Member, Appeal Division