Citation: *MK v Canada Employment Insurance Commission*, 2024 SST 188

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. K.
Representative:	D. K.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated December 21, 2022 (GE-22-2691)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Teleconference
Hearing date:	December 13, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	February 28, 2024
File number:	AD-23-96

Decision

[1] M. K. is the Claimant.

[2] The General Division didn't make a reviewable error. This means the appeal is dismissed.

Overview

[3] The Claimant's son, D. K., has been acting as her representative and helping her throughout the entire process. I will refer to him as the Claimant's son.

[4] On November 1, 2021, the Claimant wasn't allowed to be at work because her employer says she didn't follow its vaccination policy. There is no dispute that the Claimant had an interruption in her employment starting November 1, 2021.[1]

[5] The Claimant waited until March 13, 2022, to apply for Employment Insurance (EI) benefits.[2] The Claimant requested to have her claim antedated (backdated) to November 1, 2021.[3]

[6] The Canada Employment Insurance Commission (Commission) denied the Claimant's request for antedating. The Claimant appealed to the Social Security Tribunal General Division, and her appeal was dismissed.

[7] The Claimant argues the General Division made important errors of fact. Because of this, she thinks her appeal should be allowed and her claim for benefits should be antedated.

[8] I have considered all of the Claimant's arguments. I don't find the General Division made any errors that would allow me to intervene (step in). That means I must dismiss the appeal.

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[1] This was confirmed during the Appeal Division hearing.
[2] See the application for Employment Insurance (EI) benefits at GD3-10.
[3] See GD3-16.

Issue

[9] Did the General Division base its decision on an important error about the facts of the case?

Analysis

[10] I can intervene only if the General Division made a relevant error. There are only certain errors I can consider.[4] Briefly, the errors I can consider are about whether the General Division did one of the following:

- acted unfairly in some way
- decided an issue it should not have, or didn't decide an issue it should have
- didn't follow or misinterpreted the law
- based its decision on an important error about the facts of the case

[11] The Claimant checked the "error of jurisdiction" box on the application to the Appeal Division. At the Appeal Division hearing, the Claimant said the only errors he is concerned with in the General Division's decision are factual ones.[5]

The General Division didn't base its decision on an important error about the facts of the case

[12] The Appeal Division process isn't a redo of the General Division hearing. Unless there is an error, I can't just reweigh the evidence that was before the General Division.[6] So, even if I would have decided the case differently, I can't make changes to the decision unless there is an error of fact identified.[7]

[13] The General Division is given some freedom when it makes findings of fact. When I look at whether I can intervene, there has to be an important error that the

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[4] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal.
[5] See the alleged factual errors at AD1B in the appeal record.
[6] See *Uvaliyev v Canada (Attorney General)*, 2021 FCA 222 at paragraph 7; and *Sibbald v Canada (Attorney General)* 2022 FCA 157 at paragraph 27.
[7] The finding of fact must be made in a perverse or capricious manner or without regard to the material. See *Canada (Attorney General) v Bernier*, 2017 FC 120 at paragraph 34.

General Division **based** its decision on. So, if the finding is "willfully going contrary to the evidence," or if crucial evidence was ignored, then I could intervene.[8]

[14] The General Division doesn't have to mention every piece of evidence.[9] The law is clear that I can intervene only if the General Division "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[10]

[15] The Claimant's son details eight paragraphs from the General Division decision that he believes have factual inaccuracies. I have considered all of them. But none of them meet the criteria in a way that would allow me to intervene.

– **The General Division didn't ignore the Claimant's difficulties with the English language**

[16] The Claimant's son argues that the General Division ignored that the Claimant was relying on him due to her difficulties with the English language.[11]

[17] The General Division acknowledges the Claimant has some language barriers and was relying on her son.[12] At the hearing, the General Division asked about exceptional circumstances.[13] The Claimant's son said there weren't any, except that the union told them to wait to apply for EI benefits.

[18] The General Division didn't base its decision on an important mistake about the Claimant's abilities in English. Similarly, the General Division didn't overlook the Claimant's language barrier as an exceptional circumstance.

[19] A language barrier doesn't create an exceptional circumstance in any event. It isn't exceptional to get help from a friend or family member. In this case, the Claimant got help from her son.

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[8] See *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[9] See *Rahal v Canada (Minister of Citizenship & Immigration)*, 2012 FC 319 at paragraph 39.
[10] See section 58(1)(c) of the DESD Act.
[11] See AD1B-2, where the Claimant refers to paragraphs 21 and 33 of the General Division decision.
[12] See the General Division decision at paragraphs 34 and 35.
[13] See the General Division hearing recording at 28:17.

– The number of phone calls the Claimant's son made wasn't an important error of fact

[20] The General Division didn't make an important error about how many phone calls the Claimant's son made because there was evidence to support its finding. The Claimant's son told the General Division that he tried making calls on two separate occasions.[14] The Claimant's son later argued that he attempted more than two phone calls to "EI" (Service Canada).[15] The General Division found the Claimant only made a couple of calls and then waited until March 2022 to go to a Service Canada centre. Even if he made "a few" calls, this would not be a material difference.

[21] As well, the General Division didn't base its decision on the number of phone calls the Claimant's son made. The issue in this case is the delay. Not the number of calls the Claimant, or her son, made. The difference between two or a few calls isn't an important error of fact. Moreover, the Claimant's son specifically told the General Division that he made two calls.

[22] The important issue here is that the Claimant, or her son, didn't take any additional step from the attempted phone calls until March 2022.[16] The General Division found this meant the Claimant didn't have good cause for the entire period of delay.[17]

– It wasn't an error of fact for the General Division to mention the employer's policy

[23] The Claimant's son takes issue with some of the comments the General Division made about the employer's policy and the involvement of the Claimant's union.[18] The employer's policy isn't at issue in this case. The only issue is the Claimant's delay in applying for benefits. These allegations aren't relevant errors of fact. Part of the

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[14] See the General Division hearing recording at 00:08:15.
[15] See AD1B-2, where the Claimant refers to paragraph 20 of the General Division decision. It should be noted that, during the General Division hearing, the Claimant's son specifically talks about making only two calls.
[16] It isn't entirely clear when the attempted phone calls were made. The Claimant's son seems to suggest in his submission AD1B2, in his comments about paragraph 27, that the calls weren't later than January 2022. The Claimant's son also recognizes in his arguments that "EI can be done at home."
[17] See the General Division decision at paragraphs 27 and 35.
[18] See AD1B-2, where the Claimant refers to paragraphs 22, 23, 24, 25 and 27 of the General Division decision.

Claimant's argument to the General Division is that her employment status (whether she was dismissed) wasn't known, so she couldn't apply for benefits. I will deal with this below.

– The General Division didn't base its decision on an important error of fact when it found the Claimant's employment had ended

[24] The General Division made appropriate findings about the Claimant's employment status.[19] The General Division found there were several facts that should have made the Claimant realize there was an interruption in her employment.[20] There were five factors that the General Division listed.

[25] The Claimant's employer prevented her from reporting for work on November 1, 2021, and stopped paying her. The employer sent a letter to the Claimant on October 22, 2021, that warned she would not be allowed to report to work if she didn't comply with the employer's policy. The same letter also said the employment relationship would end on December 15, 2021, without further notice, if she didn't comply with the employer's policy.

[26] The Claimant's son argues the separation date is conflicting and confusing and should not be relied on.[21] But the issue isn't about the Claimant's separation date. The issue the General Division had to decide was whether the Claimant had good cause for her delay in applying for benefits. The Claimant waited until March 13, 2022, to apply.[22] So, the issue of the delay between November 1, 2021, and December 15, 2021, isn't a deciding factor. The Claimant has to show good cause for the **entire** delay.

[27] The clear factual finding is that the Claimant was fighting her **dismissal** through her union. This means there was an interruption in her employment. The General Division didn't accept as good cause that the Claimant didn't know her employment

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[19] See the General Division decision at paragraph 28.
[20] See the General Division decision at paragraph 27.
[21] See AD1B-2, where the Claimant refers to paragraph 27 of the General Division decision.
[22] See GD3-10.

status. This means there was evidence to support the General Division's findings. So, there wasn't an important error of fact, and I can't intervene on this issue.

– **The General Division didn't base its decision on an important error of fact when it said that working with the union on her dismissal and waiting for a termination letter was contradictory**

[28] The General Division found the Claimant was working with her union to challenge her dismissal. The General Division found this meant it was contradictory for the Claimant to say she was waiting for a termination letter from her employer before applying for EI.[23]

[29] The Claimant's son argues it was reasonable for the Claimant to rely on her union to fight her dismissal.[24] He argues that it wasn't reasonable to look into EI earlier because of the Claimant's reliance on her union.[25] Except the Claimant's son also said he was making calls to Service Canada. The calls seem to have occurred in January 2022 or before. So, it seems the Claimant's son was looking into whether the Claimant could get EI.

[30] On January 27,2022, the union emailed the Claimant and told her she would not be receiving a termination letter from her employer.[26] It is possible the General Division was referring to this when it noted it was contradictory that the Claimant was waiting for a termination letter. But there was clearly an interruption in the Claimant's employment because she was grieving her dismissal through her union.

[31] It was open to the General Division to note that there was something inconsistent about saying that she was challenging her **dismissal** and also saying she **wasn't yet dismissed** because she didn't have a termination letter. The General Division clearly

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[23] See the General Division decision at paragraph 27.
[24] The Claimant's son argues that the General Division accepted that there was a collective agreement in place and therefore it was reasonable for the Claimant to rely on her union to fight her dismissal. See AD1B-2, where the Claimant refers to paragraph 25 of the General Division decision.
[25] See AD1B-2, where the Claimant refers to paragraphs 23 and 24 of the General Division decision.
[26] See GD3-23.

didn't make any mistakes about the existence of the labour dispute, what the Claimant was told by the union, or the explanations that she provided for not applying sooner.

[32] The General Division found the Claimant didn't show good cause for her delay in applying for EI.[27] The General Division found that a reasonable and careful person in the Claimant's situation would have taken steps earlier to find out about benefits. It also noted that there weren't guarantees that the Claimant's union would be successful with the grievance about her dismissal.

[33] Again, the focus of the case isn't about whether the Claimant had good reason to fight her dismissal from her employer. The issue is whether the Claimant had good cause for her delay in applying for benefits.

[34] I accept the Claimant's argument that she believed the union was helping her with the issue she had with her employer. Yet, EI benefits are separate from this. The evidence shows the Claimant was trying to find out about her other rights concerning EI from January 2022 or before.

[35] The General Division didn't make any important errors of fact that would change the outcome of the decision.

[36] The Claimant was granted permission to appeal to have a merits hearing. At the permission to appeal stage, the only consideration is whether there is an arguable case. That is a low threshold. That means someone only has to have a potential argument that there was an error in the General Division decision.

[37] Yet, it is different at the merits hearing for the appeal. At this stage, it must be shown that there actually **is** an error. This is a higher threshold than just being able to show you might have an argument. In this case, the Claimant hasn't shown that there is an error in the General Division decision.

[38] It is possible that the General Division could have explained the contradiction that it noted. But the General Division isn't held to a standard of perfection. So, even if the

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[27] See the General Division decision at paragraph 23.

Claimant disagrees with how the General Division characterized the evidence, the General Division didn't ignore or misinterpret the evidence. The General Division's findings weren't made in a perverse and capricious manner. The General Division applied the correct legal test. There weren't any important errors of fact. This means there isn't an error that allows me to intervene.[28]

Conclusion

[39] The General Division didn't base its decision on any important errors of fact.

[40] The appeal is dismissed.

Elizabeth Usprich
Member, Appeal Division

[28] See *Page v Canada (Attorney General)*, 2023 FCA 169 at paragraph 77.