



Citation: *GM v Canada Employment Insurance Commission*, 2024 SST 190

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: G. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 31, 2023
(GE-23-1320)

Tribunal member: Janet Lew

Decision date: February 28, 2024

File number: AD-24-62

Decision

[1] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal the General Division decision is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, G. M. (Claimant), is asking for an extension of time to file his application with the Appeal Division. He is also asking for leave (permission) to appeal the General Division decision of October 31, 2023.

[3] The General Division found that the Claimant was not available for work for the purposes of the *Employment Insurance Act* from January 25, 2021 to April 30, 2021, and from September 2, 2021 to October 24, 2021.¹ So, he was not entitled to get Employment Insurance benefits for these periods.

[4] The Claimant argues that the General Division made important factual errors. His arguments do not deal with the period from September 2, 2021 to October 24, 2021. They deal with the period from January 25, 2021 to April 30, 2021. He claims that he was available for work from January 25, 2021 to April 30, 2021 and that the General Division made factual mistakes about this time period.

[5] The Claimant agrees that he was late when he filed his application with the Appeal Division. He says there were delays because he was relying on his representative to help him. He later found out that his representative was not going to help him after all. So, he ended up filing the application on his own.

[6] Because the Claimant was late, I have to consider whether to grant an extension of time. I have to be satisfied that the Claimant has a reasonable explanation for why he

¹ The General Division also found that the Claimant was available for work from May 1, 2021 to September 1, 2021, and from October 25, 2021 to November 25, 2021. He was not disentitled from receiving Employment Insurance benefits for these periods. He is not challenging this part of the decision.

was late when he filed his application to the Appeal Division. If he does not have a reasonable explanation, this ends the appeal.

[7] If I grant an extension of time, I still have to consider whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.² If the appeal does not have a reasonable chance of success, this also ends the matter.³

[8] The Claimant has a reasonable explanation for his delay. However, the appeal does not have a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with the appeal.

Issues

[9] The Issues in this appeal are as follows:

- a) Was the application late?
- b) If so, should I extend the time for filing the application?
- c) If I grant an extension of time, is there an arguable case that the General Division made important factual errors?

Analysis

The application was late

[10] The Claimant acknowledges that he was late when he filed his application. The Social Security Tribunal emailed him a copy of the General Division decision on October 31, 2023. He is considered to have received a copy of the General Division decision the next business day, on November 1, 2023.⁴

² See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

³ Under section 58(2) of the *Department of Employment and Social Development (DESD) Act*, I am required to refuse permission if I am satisfied, “that the appeal has no reasonable chance of success.”

⁴ See section 22(1)(3) of the *Social Security Tribunal Rules of Procedure*. The section says that when a party receives a document electronically, the document is considered received on the next business day.

[11] The Claimant then had 30 days to file an application for leave to appeal with the Appeal Division.⁵ He should have filed an application by no later than December 1, 2023. But he did not file an application until January 13, 2024. He was late by more than 40 days. Because the Claimant did not file an application on time, he has to get an extension of time.

I am extending the time for filing the application

[12] When deciding whether to grant an extension of time, I have to consider whether the Claimant has a reasonable explanation for why the application is late.⁶

[13] The Claimant says that he was relying on his representative. Initially, she was not available. Later, she had to find an interpreter. But then she decided that she would no longer help him with his case. Once he found out that she was not going to be helping him, he filed the application.

[14] I am satisfied that the Claimant has a reasonable explanation for the delay. So, I am granting an extension.

[15] Next, I have to consider whether to give the Claimant permission to appeal.

I am not giving the Claimant permission to appeal

[16] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.⁷ For these types of factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.⁸

⁵ See section 59(1)(a) of the DESD Act. The section says that an application for leave must be made to the Appeal Division 30 days after the day on which the decision made by the Employment Insurance Section is communicated to the appellant.

⁶ It says this in section 27(2) of the *Social Security Tribunal Rules of Procedure*.

⁷ See section 58(1) of the DESD Act.

⁸ See section 58(1)(c) of the DESD Act.

The Claimant does not have an arguable case that the General Division made important factual errors

[17] The Claimant does not have an arguable case that the General Division made important factual errors. The evidence supported the General Division's findings.

[18] The Claimant argues that the General Division did not really understand the evidence, or that it misinterpreted what the evidence says. He argues:

- His doctor recommended that he not work until May/June 2021 because he was immunocompromised. With COVID-19, he was at greater risk and had to avoid crowded public areas.⁹ His doctor did not say anything about his physical strength.
- He finished leukemia treatment on October 23, 2020. He had ample time to rest and regain his energy and physical strength.
- He decided to take a healthcare assistant program online in the evening so he would be available to work mornings.
- He denies that he ever said that he was unable to work. He admits that he did not have the same strength that he had before he was sick. He claims that he had the energy, willingness, and time to work. But he could not find a suitable job.

[19] The Claimant's practicum was full-time and ran from September 2, 2021 to October 24, 2021. The General Division found that the practicum was sufficiently demanding that the Claimant felt he needed to ask for two weeks off when his family visited in October. The General Division concluded that it was more likely than not that the Claimant was unable to work while doing his practicum.¹⁰ The Claimant does not challenge these findings.

⁹ See Claimant's Application to the Appeal Division - Employment Insurance, at AD1-3.

¹⁰ See General Division decision, at para 52.

[20] So, this leaves the period from January 25, 2021 to April 30, 2021 in dispute.

[21] The question about the Claimant's health was an issue up to May/June 2021.

The doctor's note reads as follows:

He was treated with chemotherapy from February 2020 to November 2020. He will remain immunocompromised for the next 3-6 months. [He] will require this time to recover from his life-threatening illness. His prognosis is very good, however he has gone through many months of therapy, and requires time to recover. I have advised him that he should not work at present during the COVID 19 pandemic. He can consider a return to work in May/June 2021.¹¹

[22] The Claimant argues that the General Division failed to appreciate why his doctor recommended that he remain off work to May/June 2021. He was immunocompromised at that time. He says that his doctor's recommendation had nothing to do with his physical strength. He claims he could have worked, even though his doctor recommended against it.

[23] The General Division accepted that, despite the doctor's recommendation against working, the Claimant had been looking for work from January 1, 2021 to September 1, 2021. However, the General Division found that the Claimant was not capable of nor available for work until May 2021.

[24] The General Division explained how it came to this finding. It said that the Claimant admitted that he was very weak, and that even three years after his treatment, he still found an 8-hour day challenging. So, it concluded that it was unlikely that he would have been able to work as a cleaner or care aid,¹² on top of attending four hours¹³ of classes every night.

¹¹ See doctor's note dated December 18, 2020, at GD 2-2 and 3-51.

¹² At approximately 1:09:40 to 1:10:15 of the audio recording of the General Division hearing, the Claimant testified that he had limited work experience and was qualified to do only labour jobs. The Claimant testified through an interpreter.

¹³ The General Division seems to have miscalculated the Claimant's hours of online schooling. At paragraph 27, the General Division noted that the classes ran for five hours, from 5 pm to 10 pm Mondays to Thursdays, and for six hours, from 3 pm to 9 pm on Fridays.

[25] The Claimant denies that he lacked the physical strength or energy to work. He denies that he ever said that he was physically unable to work from January 25, 2021 to April 30, 2021.

[26] However, when the Claimant spoke with the Respondent, the Canada Employment Insurance Commission (Commission), he reportedly stated that he was not strong enough to work.¹⁴ Another time, he told the Commission that while he was in school, he was not able to work.¹⁵

[27] It is not clear that the Claimant had an interpreter when he spoke with the Commission. But, setting aside the Commission's notes, other evidence showed that the Claimant was weak. When he filed his Notice of Appeal with the General Division, he wrote that it was not safe for him to work with others and "also [he] was very weak due to the treatment of chemotherapy."¹⁶

[28] At the General Division hearing, the Claimant testified that he was unable to work but felt that he could do some training during the period that his doctor said he should remain off work. Online courses would not require any exertion or physical work. He was able to take training while on medical leave. He pursued the training on his own. His doctor knew and supported him.¹⁷ He also explained that he needed to take a course so that he would not fall into depression as he was alone at the time and did not have his family with him.¹⁸

[29] The Claimant's representative confirmed that the Claimant was suffering from treatment and not able to work from January 25, 2021.

¹⁴ See Supplementary Record of Claim dated November 1, 2021, at GD 3-35.

¹⁵ See Supplementary Record of Claim dated August 4, 2022, at GD 3-45.

¹⁶ See Notice of Appeal at GD 2-6.

¹⁷ At approximately 15:30 to 16:39 of the audio recording of the General Division hearing.

¹⁸ At approximately 1:01:04 to 1:03:09 of the audio recording of the General Division hearing.

[30] The Claimant's representative noted that the Claimant's doctor recommended that he stay off work until June of that year because COVID-19 was still prevalent. The Claimant needed to reduce his risk of exposure by staying off work.¹⁹

[31] The Claimant also testified that he understood his doctor recommended that he remain off work until May/June 2021 because of the risk of exposure to COVID-19. He testified that his "immunity was weak."²⁰

[32] It is clear that the Claimant had to reduce his risk of exposure to COVID-19. He was clearly immunocompromised. But there was also evidence that showed the Claimant was weak.

[33] The evidence supported the General Division's findings that the Claimant could not work from January 25, 2021 to April 30, 2021, for health-related reasons. Even if there was no issue about whether he was physically weak, it is clear that the Claimant's immunocompromised state put him at too much risk of exposure for him to consider working.

[34] I am not satisfied that there is an arguable case that the General Division made an important factual error.

Conclusion

[35] An extension of time is granted. But because the appeal does not have a reasonable chance of success, permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

¹⁹ At approximately 34:00 and 38:58 to 39:50 of the audio recording of the General Division hearing.

²⁰ At approximately 1:05:36 to 1: of the audio recording of the General Division hearing.