Citation: *ML v Canada Employment Insurance Commission*, 2024 SST 1044

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated July 2, 2024 (GE-24-1343 and GE-24-1345)

Tribunal member:	Janet Lew
Decision date:	August 30, 2024
File number:	AD-24-521 and AD-24-522

Decision

[1] Leave (permission) to appeal is refused for both applications. Neither appeal will be going ahead.

Overview

[2] The Applicant, M.L. (Claimant), is seeking leave to appeal the General Division decision, on two issues.

[3] The General Division joined two appeals. It found that the issues arising from each appeal were similar. The two issues were as follows:

i. whether the Claimant could antedate (backdate) her claim for benefits to March 19, 2023,[1] so that it could be treated as if she had made it on that date, and

ii. whether the Claimant had enough insurable hours to qualify for Employment Insurance benefits.[2]

[4] I will join both applications for the same reason that the General Division did. The same facts relate to both issues. More importantly, the issues overlap.

[5] The General Division found that the Claimant did not meet the requirements to be able to backdate her claim. In particular, it found that she did not qualify for benefits on March 19, 2023. For that reason, the General Division decided that the Claimant could not treat her claim as if she had made it on that date. The General Division refused the Claimant's request to backdate her claim to March 19, 2023.

[6] The General Division also found that the Claimant did not have enough hours within her qualifying period to establish a claim for Employment Insurance sickness benefits. It found that she had 490 out of a required 600 hours of insurable employment.

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[1] General Division file number GE-24-1343.
[2] General Division file number GE-24-1345.

[7] The Claimant argues that the General Division made a jurisdictional error. She claims that her employer failed to provide accurate pay records. As a result, she says the General Division made a decision based on incomplete records. She writes that she would like to be given more time to get records to show that she did in fact have sufficient hours to qualify for sickness benefits. She writes that she is "only short by 16 hours or less,"[3] although this would be based on being able to backdate her claim to March 19, 2023.

[8] Before the Claimant can move ahead with the appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[4] If the appeal does not have a reasonable chance of success, this ends the matter.[5]

[9] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with the appeal.

Preliminary matters

[10] The Claimant asked for an extension of time on August 28, 2024, to file additional documents to support her appeal. She remains hopeful that her employer will provide a corrected Record of Employment to show that she worked more hours than the record currently shows. She wants the Appeal Division to consider any corrected Record of Employment.

[11] Even if the Claimant's employer provides a corrected Record of Employment, I would not be able to consider this evidence. It represents new evidence and generally, the Appeal Division (Employment Insurance) does not consider new evidence, other than in limited circumstances.[6] Those circumstances do not exist here.

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[3] See Application to the Appeal Division—Employment Insurance, at AD 1-9.
[4] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[5] 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."
[6] See *Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 13 and *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at para 39.

[12] As the Appeal Division generally does not consider new evidence, I did not grant the Claimant's request for an extension of time to get additional records.

Issues

[13] The issues are as follows:

(a) Is there an arguable case that the General Division made a jurisdictional error?

(b) Is there an arguable case that the General Division deprived the Claimant of a fair chance to present her case?

I am not giving the Claimant permission to appeal

[14] 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]

[15] 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]

- **There is no arguable case that the General Division made a jurisdictional error**

[16] The General Division had to determine whether the Claimant could antedate her claim to March 19, 2023, and whether she qualified for Employment Insurance benefits. It considered both issues. The General Division acted within its scope of power and did not address or decide any other issues. Therefore, I am not satisfied that there is an arguable case that the General Division made a jurisdictional error.

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

- **There is no arguable case that the General Division deprived the Claimant of a fair chance to present her case**

[17] If anything, the Claimant's arguments are more about whether the General Division failed to observe the principles of natural justice. The Claimant suggests that she needs more time to obtain records which she says will show that she had enough hours of insurable employment.

[18] The Appeal Division wrote to the Claimant on August 14, 2024, as follows:

> You indicate in your email dated August 13, 2024, that you are preparing all the supporting documents for your case.
>
> The Appeal Division generally does not accept new evidence, so you do not have to collect any new evidence.
>
> Instead, you should be focusing on identifying any procedural, jurisdictional, legal, or factual errors that the General Division may have made.
>
> You already suggested in your Application to the Appeal Division that the General Division failed to give you enough time for you to be able to collect evidence to support your case:
>
> 1. What evidence were you trying to get to support your case at the General Division?
> 2. How was this evidence relevant to your case?
> 3. Did you ask the Social Security Tribunal ([SST]) or the General Division for more time so you could get this evidence?
> 4. When did you ask the SST or the General Division for more time?
> 5. Where in the file does it show that you asked the SST or the General Division for more time? Did the SST or the General Division give you more time or set a deadline? And if so, did you comply with any deadlines?

[19] The Claimant responded on August 15, 2024.[9] She explained the problems she experienced trying to get records from her employer. She says that her employer has been acting in bad faith and has yet to give her accurate records to show how many

[9] See Claimant's email dated August 15, 2024.

hours she worked. She says she should be given the benefit of the doubt and be granted benefits on the basis that her employer made errors.

[20] The Claimant did not address the rest of the questions from the Appeal Division. The Claimant did not confirm whether she had asked the General Division for more time so she could get more evidence to support her case. She also did not say when she might have asked for more time, and where this request(s) appears in the General Division hearing file.

[21] As it is, the Claimant filed records after the General Division hearing on May 29, 2024. She filed records or submissions on May 30 and 31, and June 11 and 12, 2024. In her email of May 30, 2024, she advised that she would be sending more attachments to support her case. Having been alerted to this, the General Division let the Claimant file more records. The Claimant filed more records by mid-June 2024.

[22] The Claimant did not ask the General Division for more time after this so she could get more records. There is no indication in the hearing file that the General Division member was aware of the Claimant's desire for more time to get more records after mid-June 2024.

[23] On July 4, 2024, the Claimant wrote to the Tribunal again. She wondered what was happening with her case. (By then, the General Division had issued its decision, but clearly the Claimant had yet to receive it.) The Claimant's letter of July 4, 2024, suggests that, at that point, the Claimant was not actively trying to get more records. In other words, she was not asking the General Division for more time so she could get records.

[24] The General Division could not possibly have known that the Claimant might have been able to get more records, or that she might have wanted more time to get any records (though there is no evidence that the Claimant wanted more time). Without possibly knowing any of this, it cannot be said that the General Division did not give the Claimant a fair chance to present her case.

[25] Here, there is nothing to suggest that the Claimant did not receive a fair hearing or the chance to fully present her case at the General Division. There is nothing to suggest either that the General Division member was biased or that there was a reasonable apprehension of bias.

[26] I am not satisfied that there is an arguable case that the General Division failed to observe the principles of natural justice or that it deprived the Claimant of a fair chance to present her case.

- **The Claimant says that she can still get more records to support her case**

[27] The Claimant suggests that she can still get more records that will show she has enough hours to qualify for benefits.

[28] The Claimant has been trying to get records from her employer. She wrote to her employer for corrected records. However, her employer has yet to be forthcoming.

[29] As I noted above, even if the Claimant gets the corrected records, as it stands, the Appeal Division does not have any authority to reassess the Claimant's assertions that she worked more hours to qualify for benefits, or that her claim should be backdated.

[30] If the Claimant is able to get these corrected employment records, she can send them to the Canada Employment Insurance Commission (Commission). She can ask the Commission to review the records, with a view to rescinding or amending its decision, based on those new facts.

[31] In other words, if there are new facts or records that should become available, the Commission might still be able to consider those new facts. However, the issue of backdating her claim would still likely have to be addressed.

Conclusion

[32] Permission to appeal for both applications is refused. This means that neither appeal will be going ahead.

Janet Lew
Member, Appeal Division