Citation: ***C. N. v. Canada Employment Insurance Commission*****, 2015 SSTAD 737**

Date: June 15, 2015

File number: AD-13-698

APPEAL DIVISION

Between:

C. N.

Applicant

and

Canada Employment Insurance Commission

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] On August 29, 2012, the Board of Referees (Board) determined that the claimant (Applicant) did not show good cause for the delay in filing her claim for benefits and that she did not have sufficient hours to establish a claim for benefits.

[2] The Applicant stated that she filed an application for leave to appeal (Application) with the Office of the Umpire (OU) in late October 2012. She followed up months later to be told that matters before the OU were moved to the Social Security Tribunal (Tribunal) and was given a contact telephone number with the Tribunal. She made numerous attempts to get information from the Tribunal on the status of her appeal. Eventually, she was told that there was no case in her name before the Tribunal, and she would need to file the Application directly with the Tribunal. It was July 2013 before she knew that she had to refile the Application.

[3] The Application was filed with the Tribunal in early August 2013. The Applicant provided a detailed explanation on the loss of her file by the OU or the Tribunal and made submissions on her continued intention to appeal the Board decision.

ISSUE

[4] The Tribunal must first decide if an extension of time to apply for leave to appeal should be granted.

[5] If an extension of time is granted, the Tribunal must decide if the appeal has a reasonable chance of success.

SUBMISSIONS

[6] The Applicant submitted in support of the Application that:

a) She was laid off, she did not leave her job;

b) While it is true that she did not have enough hours, a Service Canada employee advised her that “it is not all based on hours”;

c) Page 4 of the Board decision stated that she did not take steps for more than a year to file an antedate application and this is incorrect;

d) She did not attend school but was in a government program and placed with a community partner for experience;

e) The Board based their decision on the number of hours required and not “a total examination of the facts”;

f) The Board decision stated that there was no new evidence presented to the Board and this is wrong. She presented documents to the Board and testified at the hearing.

g) The Board stated that they were required by law to uphold the Commission’s decision even if her claim fell only one hour short;

h) Her employer hired employees and laid them off just shy of the required number of hours needed for an EI claim; and

i) If her claim is not allowed, then there should be changes to the *Employment Insurance Act* (EI Act) to allow for extenuating circumstances.

LAW AND ANALYSIS

[7] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made to the Appeal Division, in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant, and the Appeal Division may allow further time within which an application for leave is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

[8] According to subsections 56(1) and 58(3) of the DESD Act, “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal”.

[9] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (DESD) *Act*, “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal”.

[10] Subsection 58(2) of the DESD Act provides that “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success”.

[11] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) 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.

[12] For our purposes, the decision of the Board is considered to be a decision of the General Division.

Extension of Time

[13] As to the late filing of the Application, the Applicant has explained the delay and demonstrated a continued intention to pursue the application. When she was advised that the Tribunal did not have a file related to her appeal filed with the OU, she prepared the Application anew and filed it with the Tribunal less than one year after the day on which the Board decision was communicated to her.

[14] There is no prejudice to the Respondent in allowing the extension. The Respondent was asked for submissions and chose not to file any. It did not object to an extension or allege any prejudice should an extension of time be granted.

[15] I will address the issue of whether there is a reasonable chance of success in the context of the leave application, immediately below.

[16] I am satisfied with the Applicant's explanation for the delay in filing the Application, her continued intention to pursue the appeal and that there is no prejudice to the Respondent. These are factors that are relevant to a request for an extension of time. In the interests of justice, I grant an extension of time for the filing of the Application.

Application for Leave to Appeal

[17] The Tribunal must be satisfied that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[18] Many of the Applicant's submissions, as set out in paragraph [6] above, were made at the Board hearing. A repetition of the arguments made before the Board is not sufficient. There must be reasons for appeal raised in the Application that fall within one of the enumerated grounds of appeal.

[19] The Applicant's submissions in subparagraphs [6] c) and g) are based on portions of the Board's decision that quote from previous CUB or Federal Court of Appeal jurisprudence. The reference to "one year" and "one hour" did not relate to the Applicant's case but to the jurisprudence cited.

[20] Changes to the EI Act cannot be requested by way of an appeal to the Tribunal, and the Tribunal does not have jurisdiction to make legislative changes. The submission in subparagraph [6] i), above, is not a ground of appeal which falls into the enumerated grounds of appeal.

[21] There is only one of the Applicant's submissions which may fall within one of the enumerated grounds, specifically subparagraph [6] f): that the Board decision stated that there was no new evidence presented to the Board and this is wrong. The Board's decision at page 3 noted: "No new evidence was presented to the Board." However, the Applicant argues that she had presented documents and had testified at the Board hearing. This argument suggests erroneous findings of fact (that the Board made in a perverse or capricious manner or without

regard for the material before it) or errors of mixed fact and law (when the Board made its findings on the basis that there was no new evidence presented to the Board when there was documentary and oral evidence presented at the hearing).

[22] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal.

[23] The Application has set out reasons which fall into the enumerated grounds of appeal, and I am satisfied that the appeal has a reasonable chance of success on this one ground, as described in paragraph [21] above.

CONCLUSION

[24] The Application is granted.

[25] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[26] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division