

Citation: *L. D. v. Canada Employment Insurance Commission*, 2015 SSTAD 1117

Date: September 18, 2015

File number: AD-15-61

APPEAL DIVISION

Between:

L. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On February 3, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) refused an extension of time to appeal to the GD from a reconsideration decision of the Canada Employment Insurance Commission (Commission). The GD decision was sent to the Applicant on February 3, 2015.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on February 17, 2015. The Application was filed within the 30 day limit.

ISSUE

[3] The AD of the Tribunal must decide if the appeal has a reasonable chance of success.

SUBMISSIONS

[4] The Applicant submitted in support of the Application that there were errors in the GD decision and that repayment of the amounts said to be outstanding would financially ruin her family.

LAW AND ANALYSIS

[5] Subsection 52(1) of *Department of Employment and Social Development (DESD) Act* states that an appeal of a decision made under the *Employment Insurance Act* must be brought to the General Division of the Tribunal within 30 days after the day the decision is communicated to the Appellant.

[6] 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”.

[7] 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”.

[8] 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.

[9] The Applicant filed a Request for Reconsideration with the Commission on July 11, 2014. This request was denied on September 18, 2014. The Application does not state on what date the reconsideration decision was received by the Applicant.

[10] The Applicant filed an “Application Requesting Leave to Appeal to the Appeal Division” (of the Tribunal) which is date-stamped by the Tribunal on October 10, 2014. On November 3, 2014, the Applicant submitted a second “Application Requesting Leave to Appeal to the Appeal Division”. “Originally faxed Oct 10” is handwritten on the top of the November 3 document. The November 3, 2014 Application was treated by the GD as a completed Notice of Appeal.

[11] Both the October 10, 2014 and the November 3, 2014 applications were incorrect in form, in that they were applications requesting leave to appeal to the Appeal Division, when the appeal was meant for the GD of the Tribunal. The Tribunal treated the appeal as one brought to the GD, and it is the GD that confirmed receipt of the appeal on November 5, 2014.

[12] In the GD decision refusing an extension of time, the Member found that:

[22] The claimant’s Request for Reconsideration was rejected on September 18, 2014. The claimant appealed to the Tribunal on November 3, 2014. There is no evidence of any other communication with or from the claimant during the period from September 18, 2014 to November 3, 2014.

[13] The emphasis is mine to indicate where the GD Member appears to have misapprehended the date that the Applicant's appeal was filed. This would be a fundamental error, as the appeal to the GD may not actually have been filed late.

[14] The GD Member relies on this finding to conclude that the Applicant did not indicate a continuing intention to pursue the appeal.

[15] In addition, although I make no findings on the issue at this time, I note on the face of the record that the GD Member may not have applied the correct test to be used where an extension of time is requested. While the GD decision refers to the *Gattellaro* factors and the overriding consideration being that of the interests of justice being served, the GD Member concluded:

[26] The claimant failed to meet three of the criteria for which an extension may be granted. She did not indicate a continuing intention to pursue the appeal, did not have an arguable case and provided no reasonable explanation for the delay.

[16] The *Gattellaro* factors were referred to but the overriding consideration of the interests of justice does not appear to have been applied. If shown to be true, this could also result in a successful appeal.

[17] Considering the possible error in findings of fact (made in a perverse or capricious manner or without regard for the material before it) and possible error of law, and my review of the GD decision and docket, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[18] The Application is granted.

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

[20] 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