Citation: ***A. B. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1257**

Date: October 26, 2015

File number: AD-15-95

APPEAL DIVISION

Between:

A. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On October 28, 2014, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) refused an extension of time within which to bring an appeal. The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on December March 3, 2015, outside of the 30 day limit.

[2] The Applicant stated that due to his work schedule, it took many phone calls before he was able to speak to someone about bringing an appeal to the AD in January 2015. He waited for forms to be sent to him in February 2015 and, as a result, filed his Application late.

[3] The decision the Applicant is appealing is a refusal of an extension of time. The GD refused to grant an extension of time within which to bring an appeal of the reconsideration decision of the Canada Employment Insurance Commission (Commission). The Applicant submitted an incomplete appeal to the GD outside of the 30 day limit (60 days after the reconsideration decision). The Tribunal asked the Applicant to provide reasons for the late appeal to the GD and why he believes that he has an arguable case. While the Applicant sent in replies on August 19, 2014 and October 23, 2014, he mainly repeated his arguments relating to the Commission's initial determination that he had made false representations.

[4] The GD found that the Applicant did not show a continuing intention to pursue his appeal and did not offer a reasonable explanation for the delay. The GD was not satisfied that the Applicant had an arguable case on the appeal and concluded that the Applicant had not provided any compelling explanations to warrant granting the extension of time.

ISSUES

[5] In order for the Application to be considered, an extension of time to apply for leave to appeal to the AD must be granted.

[6] Then, the AD must decide if the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[7] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant. Further, the AD 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] 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."

[10] 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.

Extension of Time

[11] The Application was date stamped March 3, 2015. The GD decision was sent to the Applicant under cover of a letter dated October 28, 2014. The Applicant did not state on what date he received the GD decision.

[12] Under paragraph 19(1)(a) of the *Social Security Tribunal Regulations*, I deem that the decision of the GD was communicated to the Applicant 10 days after the day on which it was mailed to him on October 28, 2014. Accordingly, I find that the decision was communicated to the Applicant on November 7, 2014.

[13] The Application was, therefore, filed 118 days after it was communicated to the Applicant, 88 days after the 30 day limit.

[14] The factors which the Tribunal considers and weighs in determining whether to extend the time period beyond the 30 day limit within which an applicant is required to file his or her application for leave to appeal are as follows:

(a) Whether there is a continuing intention to pursue the application or appeal;

(b) Whether the matter discloses an arguable case;

(c) Whether there is a reasonable explanation for the delay; and

(d) Whether there is prejudice to the other party in allowing the extension.

[15] In *Canada (Attorney General) v. Larkman,* 2012 FCA 204 (CanLII), the Federal Court of Appeal (FCA) held that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour.

[16] In *X*, 2014 FCA 249, the FCA set out the test, as follows, in paragraph 26:

> In deciding whether to grant an extension of time to file a notice of appeal, the overriding consideration is whether the interests of justice favour granting the extension. Relevant factors to consider are whether:
>
> (a) there is an arguable case on appeal;
>
> (b) special circumstances justify the delay in filing the notice of appeal;
>
> (c) the delay is excessive; and

(d) the respondent will be prejudiced if the extension is granted.

[17] Of these four factors, I find that the most important one is whether the matter discloses an arguable case.

[18] The GD requested additional information from the Applicant, on September 30, 2014, specifically to: "Outline the reasons as to why you feel you have an arguable case." The Applicant's response was that he was out of the country for 2 weeks only (September 1 to 16, 2010) and that the trip had slipped his mind when he answered questions for his EI claim. He also submitted pages of his passport and bank account statements, most of which were already in the file.

[19] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[20] Since the issue of whether the appeal has a reasonable chance of success is determinative of the Application, I will discuss this aspect of the Application first and, if necessary, return to the issue of whether the AD will grant an extension of time to apply for leave.

Leave to Appeal

[21] 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.

[22] The Applicant makes a number of submissions as to why his appeal should be allowed. His main argument is that he was not out of the country during the period that the Commission determined that he was out of the country (June, July, August and part of September 2010). He asserts that he was only out of the country for two weeks in September 2010.

[23] The Applicant did not make reference to subsection 58(1) of the DESD Act, and it is not clear to me how the GD is alleged to have erred.

[24] The GD was considering an extension of time within which to file an appeal, a matter made necessary by the late filing of the appeal by the Applicant. The decision being appealed from was a refusal by the Commission to grant an extension of time within which to file an appeal from a reconsideration decision of the Commission (relating to false representations).

[25] In *Oyenuga v. Canada (AG)*, 2013 FCA 230, a case involving the refusal of an umpire to extend the time allowed to file an employment insurance appeal, the Federal Court of Appeal held at para. 2 that:

> … [the Appellant] must show that the Chief Umpire improperly exercised his discretion to deny the extension of time. An improper exercise of discretion occurs when an Umpire gives insufficient weight to relevant factors, proceeds on a wrong principle of law, erroneously misapprehends the facts, or where an obvious injustice would result.

[26] The Application does not explain how the GD is alleged to have improperly exercised its discretion in denying an extension of time. It asserts that the Commission was wrong when it determined that the Applicant was out of the country from June 1 to September 17, 2010. This is perhaps an assertion that the GD erred in its findings of fact.

[27] The GD decision discussed the Applicant's assertion that he is innocent of false representations at paragraph [21]. The GD Member found that the Applicant failed to provide any evidence to demonstrate that he was in Canada during the period in question and that he completed 8 warrants to collect benefits, each advising that he remained in Canada during the relevant period. These findings of fact were not made in a perverse or capricious manner or without regard for the material before it.

[28] Once leave to appeal has been granted, the role of the AD is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case *de novo*. It is in

that context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[29] I have read and carefully considered the GD's decision and the record. There is no suggestion that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law nor identified any erroneous findings of fact which the GD may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[30] In order to have a reasonable chance of success, the Applicant must explain how at least one reviewable error has been made by the GD. The Application is deficient in this regard, and I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[31] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division