Citation: *M. H. v. Canada Employment Insurance Commission*, 2015 SSTAD 1292

Appeal No. AD-15-201

BETWEEN:

M. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: November 5, 2015

DECISION: Appeal allowed

DECISION

[1] On consent, the appeal is allowed. The matter is returned to the General Division for reconsideration in accordance with these reasons.

INTRODUCTION

[2] On March 18, 2015, a member of the General Division refused the Appellant's request for an extension of time to appeal. In due course, the Appellant filed an appeal of this decision with the Appeal Division and leave to appeal was granted.

[3] This appeal was decided on the record.

THE LAW

[4] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (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.

[5] Administrative law currently establishes only two standards of review, that of correctness and that of reasonableness.

[6] As previously determined by the Federal Court of Appeal in *Canada (Attorney General) v. Jewett* 2013 FCA 243, *Chaulk v. Canada (Attorney General)* 2012 FCA 190 and many other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for

questions of fact and mixed fact and law in employment insurance appeals is reasonableness.

[7] As it is settled law that discretionary decisions which set out the correct law are entitled to considerable deference, I find that the standard of review to be applied in those decisions is reasonableness.

ANALYSIS

[8] As noted above, this is an appeal from a General Division decision refusing an extension of time. As this is a very similar situation to that with which I dealt with in *Y. N. v. Canada Employment Insurance Commission*, 2015 SSTAD 633, I see no reason not to deal with this case in the same way.

[9] Subsection 52 of the *Act* establishes that an appeal of an employment insurance matter must be brought to the General Division within 30 days of the decision being communicated to the Appellant, and permits the General Division to allow an extension of time of up to one year.

[10] As s. 52 of the *Act* uses the word "may", this is a discretionary decision of the General Division member.

[11] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court at paragraph 9 set out the test to be applied in making this discretionary decision.

> "Jurisprudence relied on by the [appellant]… has established that the following criteria **must** be considered and weighed:
>
> 1. A continuing intention to pursue the application or appeal;
> 2. The matter discloses an arguable case;
> 3. There is a reasonable explanation for the delay; **and**
> 4. There is no prejudice to the other party in allowing the extension."

[Emphasis added]

[12] The Court went on to find that as all four of these factors had not been satisfied, the underlying decision of the Pension Appeals Board (a predecessor tribunal to the Appeal Division) must be overturned.

[13] Both before and after *Gattellaro*, the Federal Court of Appeal issued decisions such as *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249, which were substantively similar. In doing so, the above four criteria were established as mandatory to apply in every circumstance, as shown by the use of the word "must" and the addition of "and" between the factors.

[14] And so it was for a number of years.

[15] Recently, however, the Courts have held that the interests of justice must be paramount. It has also been confirmed that the criteria listed above should not be rigidly applied, and that other more appropriate criteria should be substituted on a case by case basis.

[16] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204, for example, the Court held at paragraph 62 that "[t]he overriding consideration is that the interest of justice be served" and also noted that not all of the factors considered must be resolved in the moving party's favour.

[17] Perhaps the most recent of these cases is *X*, 2014 FCA 249. In that case, the Court set out the test in a most clear and succinct form 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."

[18] In the case before me, the member cited a number of cases, including *Gattellaro*

and *Larkman*. He then correctly stated that the interests of justice were paramount, and set out four entirely reasonable criteria (the *Gattellero* factors listed above) to be examined.

[19] Then, however, things went wrong.

[20] In applying the law, the member rigidly applied his factors and concluded that "the [Appellant] failed to meet two of the criteria for which an extension may be granted".

[21] The extension of time was then refused without further explanation.

[22] Although the member noted that the interests of justice are supposed to be the overriding consideration, this does not appear to have factored into the member's decision and indeed is not mentioned in his analysis.

[23] Further, while the General Division member found that the appeal was late, he did not determine the length of the delay. That determination would no doubt be of importance for any decision as to whether or not the interests of justice support an extension of time. It might also impact whether a reasonable explanation for the delay had been given.

[24] Finally, I note that the member appears to have misapprehended the timeline of this appeal, and that this appeal may not have been late at all. Although the member found that the Appellant filed her appeal on January 28, 2015, the initial incomplete appeal documents are clearly date stamped October 29, 2014. As the final Appellant submissions completing the appeal are date stamped January 22, 2015 (and not January 28, 2015), it is not at all obvious to me how the member reached the conclusion he did.

[25] Having considered the matter, the Commission maintains their view that the appeal should be dismissed on the merits. They concede, however, that as the reconsideration decision was communicated to the Appellant on October 1, 2014, the appeal was not late and should not have been dismissed on that basis.

[26] Because of the above errors I find that, reviewable on the standard of reasonableness, the member failed to properly exercise his discretion. After reviewing the

evidence and the law as detailed above, I find on consent that the appeal was not filed late. If I am mistaken and the appeal was filed late, then in the interests of justice I would allow an extension of time.

[27] A new hearing is therefore ordered.

CONCLUSION

[28] On consent, the appeal is allowed. The matter is returned to the General Division for reconsideration in accordance with these reasons.

Mark Borer
Member, Appeal Division