Citation: ***G. M. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1293**

Date: November 5, 2015

File number: AD-15-991

APPEAL DIVISION

Between:

G. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] G. M. (Applicant) applies to the Appeal Division of the Social Security Tribunal of Canada (Tribunal) for leave to appeal the decision of the General Division (GD) dated March 5, 2015 and issued on March 9, 2015. The GD dismissed the Applicant's appeal and determined that he was dismissed from his employment due to misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[2] The Applicant attended the teleconference hearing held on February 25, 2015. The Canada Employment Insurance Commission (Commission) did not attend but filed written representations.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on September 7, 2015. The Application was filed outside of the 30 day time limit. The Application was acknowledged by the Tribunal as a late Application on September 14, 2015.

[4] The grounds of and reasons for appeal stated in the Application are :

a) The Applicant did not exhibit willful misconduct;

b) He filed a matter before the Ontario Labour Relations Board (OLRB) relating to his termination of employment;

c) Prior to the GD hearing, the OLRB matter had not been completed;

d) A Settlement Agreement in the OLRB matter was concluded after the GD decision was rendered;

e) The OLRB matter did not determine that he had been terminated for misconduct;

f) After receiving the documents from the OLRB matter, in June 2015, the Applicant went to a local Service Canada office to appeal the GD decision and was told that the paperwork would be sent to the Tribunal;

g) He received nothing from the Tribunal but did receive a letter from the Canada Revenue Agency (CRA), so he contacted the CRA and was given the telephone number for the Tribunal; and

h) He contacted the Tribunal and was advised by an employee of the Tribunal to submit the documents again, which he did in September 2015.

[5] The Tribunal asked the Applicant for submissions on whether an extension of time should be granted and to provide details on:

a) Whether and how the Applicant made a continuing effort to pursue an appeal;

b) A detailed explanation for the delay in filing the Application, including a copy of the Labour Board proceedings mentioned in the Application;

c) The merits of the case, and the grounds upon which the Applicant believes there is a reasonable chance of success on the substantive issues; and

d) Whether there is any prejudice to other interested parties if an extension of time is allowed.

The Applicant was given until October 19, 2015 to submit this information, which he did.

ISSUE

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

[7] Then the AD must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[8] 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.

[9] 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”.

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

[12] The Application was date stamped September 7, 2015. The GD decision was sent to the Applicant under cover of a letter dated March 9, 2015. The Applicant did not state on what date he received the GD decision.

[13] 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 March 9, 2015. Accordingly, I find that the decision was communicated to the Applicant on March 19, 2015.

[14] The Application was, therefore, filed 172 days after it was communicated to the Applicant, 142 days after the 30 day limit.

[15] 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:

1. Whether there is a continuing intention to pursue the application or appeal;

2. Whether the matter discloses an arguable case;

3. Whether there is a reasonable explanation for the delay; and

4. Whether there is prejudice to the other party in allowing the extension.

[16] 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.

[17] 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:
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> (a) there is an arguable case on appeal;
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> (b) special circumstances justify the delay in filing the notice of appeal;
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> (c) the delay is excessive; and
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> (d) the respondent will be prejudiced if the extension is granted.

[18] 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.

[19] Here, the Applicant asserts a continuing intention to pursue the appeal and states that the matter before the OLRB was not complete within the 30 day period after the GD decision. He explains that the OLRB matter was finalized by way of a Settlement Agreement in June 2015 and he went to a local Service Canada office to submit his Application on June 21, 2015.

However, his paperwork did not get from Service Canada to the Tribunal, something he did not know until after he received a letter from the CRA, called the CRA, was given the Tribunal's telephone number, and was told by the Tribunal to submit his Application directly to the Tribunal. He did this in September 2015.

[20] As for prejudice, the Applicant states that the only prejudice is to him and his family, and that there is no prejudice to the Respondent.

[21] The Applicant submits that there is an arguable case, for the reasons he gave in his Application and summarized in paragraph 4 above. Since the issue of whether the appeal has a reasonable chance of success is determinative of the Application, I will discuss the issue of reasonable chance of success below.

[22] Taking into consideration the factors relevant to an extension of time and in the interests of justice, I grant an extension of time for the filing of the Application

Application for Leave to Appeal

[23] 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.

[24] The Applicant submits, without citing the grounds enumerated in subsection 58(1) of the DESD Act that the GD based its decision on errors of fact and law by determining that he had been dismissed from his employment due to misconduct. He asks the AD to consider the documents from the OLRB matter, including a Settlement Agreement and letters following the Settlement Agreement.

[25] In *Canada (AG) v. Courchene*, 2007 FCA 183, the FCA decided on an application for judicial review based on the Umpire having ruled that Minutes of Settlement related to a loss of employment were admissible as "new facts" or a material fact that was unknown to the Board of Referees at the time of its decision. The FCA stated that:

> In relation to the to the appropriate approach to be accorded to the admission of new evidence by an Umpire, we would refer to the decision of this Court in *Gilles Dubois v.*

Canada Employment Insurance Commission and Attorney General of Canada, [1998] F.C.J. No. 768, 231 N.R. 119 at 129-121, in which Marceau J. states:

> Suffice it to say that the Umpire refused to admit the new evidence based on a strict application of the principles established by the courts holding that on appeal or judicial review, new evidence implies that either the party involved was unaware of the evidence or it was impossible to produce the evidence, at the time of the hearing at first instance.
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> . . .
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> We must express serious reservations about the application by an Umpire of formal rules developed for the smooth functioning of the courts. The Umpire is one level in the process of the administration of the **Unemployment Insurance Act**, an eminently social piece of legislation, where claimants usually represent themselves and where the boards of referees sitting a first instance have no legal training. The principles of justice suggest that submissions by claimants should be accepted very liberally at all levels; in fact this very liberal approach is required by s. 86 [now section 120] of the Act.

On this basis, the FCA concluded that the Umpire's decision in *Courchene* was reasonable.

[26] *Canada (A.G.) v. Boulton* (1996), 208 N.R. 63 (FCA) is authority for the proposition that a settlement agreement can constitute evidence that could rebut other evidence of misconduct in some circumstances and may be considered by the Umpire in appropriate cases.

[27] On the ground that there may be errors of mixed fact and law, as set out in paragraph 4, above, and in light of FCA jurisprudence, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[28] An extension of time within which to file the appeal is granted.

[29] The Application is granted.

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

[31] 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