Citation: ***S. C. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1360**

Date: November 25, 2015

File number: AD-15-381

APPEAL DIVISION

Between:

S. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On May 21, 2015 the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) refused an extension of time for the Applicant to file an appeal from a reconsideration decision of the Canada Employment Insurance Commission (Commission).

[2] The Commission (Respondent) had denied the Applicant's claim for employment insurance (EI) benefits because he had been determined to have lost his job due to misconduct. His claim was denied on reconsideration.

BACKGROUND FACTS

[3] The reconsideration decision was dated January 29, 2015 and stated that the Applicant had until 30 days after he received this decision to file an appeal. He filed a Request for Reconsideration with the Commission on February 12, 2015 which was stamped received on February 18, 2015.

[4] The Commission advised the Applicant, by letter dated March 10, 2015, that he had the right to appeal the reconsideration letter to the Social Security Tribunal and that he had "30 days following the receipt of this notice to file an appeal using the form provided by the Tribunal."

[5] The Applicant filed a Notice of Appeal (NoA) with the Tribunal on March 19, 2015 which the Tribunal considered as incomplete because, among other things, the reconsideration decision was not attached to the NoA.

[6] The Tribunal asked the Applicant, by letter dated March 24, 2015, to provide the reconsideration decision and other information. The Applicant called the Tribunal on March 26, 2015 to ask for clarification. He sent a fax to the Tribunal on March 27, 2015 with documents. He spoke to or attempted to speak to (by calling) the Tribunal on March 31, April 1, 7, 9, 13, 27 and 28, 2015 to ask for confirmation that his documents were received.

[7] On April 28, 2015, the Tribunal advised the Applicant by telephone call that he needed to make a request for an extension of time.

[8] On April 30, 2015, the newly engaged Representative of the Applicant wrote to the Tribunal and provided detailed submissions in relation to:

a) The matter disclosing an arguable case;

b) An explanation for the delay, including the sequence of events from December 27, 2014 to the date of the letter;

c) A statement that the Applicant acknowledges that he had misunderstood how to appeal the reconsideration decision but his actions, including retaining legal services, demonstrate an intention to appeal; and

d) There is no prejudice to the other parties in extending the deadline.

This letter was date-stamped May 9, 2015 by the Tribunal. The Tribunal acknowledged receipt of a complete appeal on May 12, 2015.

[9] On May 21, 2015, the GD refused the extension of time, by written decision (GD decision). The GD decision was communicated to the Applicant under cover of letter dated May 26, 2015.

[10] The Applicant's Representative received the GD decision on June 1, 2015 and filed an application for leave to appeal (Application) to the Appeal Division (AD) of the Tribunal on June 22, 2015, within the time limit.

ISSUES

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

LAW AND ANALYSIS

[12] 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 AD, in the case of a decision made by the GD Employment Insurance Section, 30 days after the day on which it is communicated to the appellant. 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.

[13] 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".

[14] 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".

[15] 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.

[16] 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.

[17] The Applicant relies on paragraphs (a) and (c) of subsection 58(1) of the DESD Act. In particular, he asserts that:

a) The GD decision was based on erroneous findings of fact made in a perverse and capricious manner and without regard to the material before it, in that:

    1. The GD concluded that there was no continuing intention to pursue the appeal on the basis that "there is no evidence of any other communication with or from the claimant during the period from January 29, 2015 to May 8, 2015 with the exception of the incomplete appeal"; and

2. The GD provided no factual or legal reasoning to conclude "the Claimant did not have an arguable case"; and

b) The GD failed to observe a principle of natural justice, in that;

1. The GD ignored evidence and the Applicant's detailed written submissions in its conclusion "the Claimant provided no evidence to explain the delay in filing his appeal"; and

2. The Applicant was deprived his right to a fair appeal process because the process was confounding and inaccessible to him.

[18] The GD decision refers to *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249, *Canada (Attorney General) v. Larkman*, 2012 FCA 204, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and *Fancy v. Canada (Minister of Social Development)*, 2010 FCA 63.

[19] However, it is insufficient to simply recite the jurisprudence and correctly identify the legal test(s), without properly applying them. The GD must correctly identify the legal test(s) and apply the law to the facts. The GD must also respect the principles of procedural fairness.

[20] The GD decision noted under the heading "Evidence":

> [20] On January 29, 2015 the Commission notified the claimant that their decision of December 27, 2014 had not changed and was being maintained.
>
> [21] On March 19, 2015 the claimant filed an incomplete appeal with the Tribunal. It was missing a copy of the reconsideration decision, the date the reconsideration decision was rendered and the claimant's signed declaration.
>
> [22] On May 8, 2015 the claimant filed a complete appeal with the Tribunal.

[21] Under the heading "Analysis" the GD decision stated:

> [25] The Tribunal finds that the appeal was in fact filed late. There is no evidence of the claimant's continuing intention to pursue the appeal and no reasonable explanation for the delay.
>
> **Continuing Intention to Pursue the Appeal**
> [26] The claimant's Request for Reconsideration was rejected on January 29, 2015. The claimant appealed to the Tribunal on May 8, 2015. There is no evidence of any other communication with or from the claimant during the period from January 29, 2015 to May 8, 2015 with the exception of the incomplete appeal.
>
> **Arguable Case**
> [27] The claimant did not have an arguable case.
>
> **Reasonable Explanation for the Delay**
> [28] The claimant provided no evidence to explain the delay in filing his appeal with the Tribunal.
>
> **Prejudice to the Other Party**
> [29] The Commission did not provide any evidence for or against any prejudice that may occur if an extension of time were to be granted.

[22] The GD decision concluded:

> [30] The claimant failed to meet three of the criteria for which an extension may be granted. He did not indicate a continuing intention to pursue the appeal, did not have an arguable case and provided no reasonable explanation for the delay.
>
> [31] The extension of time within which to bring the appeal is refused.

[23] Although the GD referred to the *Larkman* case, it does not appear to have considered whether the interests of justice would be served by allowing an extension of time. Rather, the GD seems to have mechanically applied the *Gattallero* factors, which, if made out, would be an error of law. Further, it concerns me that the GD concluded that the appeal had no merit in such a cursory manner.

[24] The Applicant's submissions on erroneous findings of fact, namely that the GD found that there was no evidence of communications except an incomplete appeal, no evidence of the Applicant's continuing intention to pursue the appeal and no reasonable explanation for the delay

are worthy of further consideration. These finding seem at odds with the GD file as detailed in paragraphs [6] to [8] above.

[25] The Applicant's assertion that the GD failed to observe a principle of natural justice also warrants further review.

[26] The Federal Court in its recent decision *Canada (A.G.) v. Bossé*, 2015 CF 1142, noted that the issue of natural justice, specifically a breach of procedural fairness, was determinative of an application for judicial review of a refusal of leave to appeal by the AD. The Court criticized certain forms of the Tribunal, the instructions for completing the forms and the guidance given by the Tribunal to applicants/appellants. The Court found a breach of procedural fairness in the treatment of the application by the Tribunal.

[27] In the present matter, the process to appeal the Commission's reconsideration decision was confounding and inaccessible to the Applicant, and the treatment of his Application by the Tribunal forms a reasonable basis upon which to assert a breach of procedural fairness and natural justice.

[28] On the grounds that there may be a breach of natural justice, errors of law and erroneous findings of fact made in a perverse and capricious manner or without regard to the material before the GD, I am satisfied that the appeal has a reasonable chance of success.

[29] Therefore, I grant the application for leave to appeal. In so doing, I note that this decision does not presume the result of the appeal on the merits of the case.

CONCLUSION

[30] The application for leave to appeal is granted.

[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