Citation: ***D. N. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1450**

Date: December 8, 2015

File number: AD-15-902

APPEAL DIVISION

Between:

D. N.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On July 16, 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 insufficient insurable hours to qualify for regular or special benefits. His claim was denied on reconsideration.

BACKGROUND FACTS

[3] The reconsideration decision was dated February 17, 2015 and stated that the Applicant had until 30 days after he received this decision to file an appeal. He filed a "Notice to Appeal – General Division Employment Insurance (EI) Section" form (NoA) which was stamped received by the Tribunal on March 4, 2015.

[4] By letter dated March 17, 2015, the Tribunal advised the Applicant that his appeal was considered incomplete because the reconsideration decision was not attached to the NoA. The Tribunal asked the Applicant to provide the reconsideration decision "without delay" and warned that if the document was not provided "within the timeframe specified", he would be required to request an extension of time.

[5] Upon receiving this letter, the Applicant brought a copy of the reconsideration decision to a Service Canada (SC) Centre in Mississauga to file with the Tribunal. The Applicant states that he was instructed to leave the document with SC to be sent to the Tribunal. The document is date stamped March 25, 2015 by SC.

[6] On April 24, 2015, the Applicant called the Tribunal to ask for confirmation that his document was received. The Tribunal advised that the reconsideration decision had not been received. The Applicant explained that he had brought it to a SC Centre. The Tribunal telephone agent suggested that he send a copy by fax.

[7] The Applicant faxed a copy of the reconsideration decision, date stamped March 25, 2015 by SC Mississauga West, to the Tribunal on April 27, 2015. It was date stamped April 27, 2015 by the Tribunal.

[8] The Tribunal acknowledged receipt of a complete NoA on May 11, 2015 and noted that the appeal was filed beyond the 30-day limit. Therefore, a Tribunal Member would need to decide if an extension of time should be granted before the appeal can proceed. The Tribunal letter did not ask the Applicant to provide an explanation for the delay or any other information relevant to the issue of delay.

[9] There were telephone calls or attempts to call between the Applicant and the Tribunal on May 11, 12 and 13, June 1, 5, 17 and 29, July 6, 13, 16, 21 and 27 2015. For the most part, the Applicant asked about the status of his appeal and was advised that his appeal had not been assigned to a member yet. On July 13, 2015, the Applicant was advised that the appeal had been assigned to a Member and that Member would review the file and make a decision on the extension of time.

[10] On July 16, 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 July 23, 2015.

[11] On July 27, 2015, the Applicant called the Tribunal and was informed that the GD had reached a decision which had been sent to him, on July 23, 2015, but that the telephone agent could not discuss the content of the decision.

[12] The Applicant received the GD decision on July 28, 2015 and filed an application for leave to appeal (Application) to the Appeal Division (AD) of the Tribunal on August 12, 2015 within the 30-day the time limit.

ISSUES

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

LAW AND ANALYSIS

[14] 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.

[15] 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".

[16] 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".

[17] 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.

[18] 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.

[19] The Applicant relies on each paragraph of subsection 58(1) of the DESD Act, and he asserts that:

a) The appeal before the GD was not late. He had taken the reconsideration decision to a SC Centre on March 25, 2015 and was instructed to leave it with them; staff at the Centre told him it was the safest way to send it and date stamped it to send to the Tribunal; and

b) The GD did not address his arguments on appeal which included that he had contributed to the EI program for 25 years and had never collected any monies or taken advantage of the system.

[20] 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.

[21] 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.

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

> [14] On January 26, 2015 the claimant filed a Request for Reconsideration. He stated that he contributed to Employment Insurance from 1977 to 2001and never needed assistance. He became disabled in 2011 and feels he should be qualified for benefits.
>
> [15] On February 17, 2015 the claimant stated to the Commission that he never contacted the Commission between February 2002 and December 1, 2014 to discuss a claim for benefits.
>
> [16] On February 17, 2015 the Commission notified the claimant that his claim for both an antedate and their decision that his benefit period was not established had not changed and was being maintained.
>
> [17] On February 26, 2015 the claimant filed an incomplete appeal with the Tribunal. It was missing the reconsideration decision.
>
> [18] On April 27, 2015 the claimant filed a complete appeal with the Tribunal.

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

> [21] The Tribunal finds that the appeal was in fact filed late. There is no evidence of the claimants continuing intention to pursue the appeal and no reasonable explanation for the delay.
>
> **Continuing Intention to Pursue the Appeal**
> [22] The claimant's Request for Reconsideration was rejected on February 17, 2015. The claimant appealed to the Tribunal on April 27, 2015. There is no evidence of any other communication with or from the claimant during the period from February 17, 2015 to April 27, 2015 with the exception of an incomplete appeal, filed February 26, 2015.
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> **Arguable Case**
> [23] The claimant did not have an arguable case.
>
> **Reasonable Explanation for the Delay**
> [24] The claimant provided no evidence to explain the delay in filing his appeal with the Tribunal.
>
> **Prejudice to the Other Party**
> [25] The Commission did not provide any evidence for or against any prejudice that may occur if an extension of time were to be granted.

[24] The GD decision concluded:

> [26] 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.
>
> [27] The extension of time within which to bring the appeal is refused.

[25] 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.

[26] The Applicant's submission that his appeal was not filed late suggests erroneous findings of fact. The GD found that the appeal was filed late. Its findings 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 also worthy of further consideration. These findings seem at odds with the GD file as detailed in paragraphs [3] to [9] above.

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

[28] 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.

[29] In the present matter, the Applicant attempted to complete his appeal by providing a copy of the reconsideration decision on March 25, 2015 to a SC Centre, 8 days after the date of the Tribunal letter asking him to do this "without delay". He called the Tribunal for confirmation that the document had been received from the SC Centre on April 24, 2015 and was advised that it had not. He faxed a SC date stamped copy of the reconsideration decision to the Tribunal on April 27, 2015.

[30] A few weeks later, the Tribunal advised the Applicant that his appeal was late and that a Tribunal Member would need to decide whether to grant an extension of time. He was not asked for submissions on an extension of time or for an explanation of the delay. He maintained throughout that his NoA was not late and that the reconsideration decision was filed within days of his being advised it was required to complete his appeal.

[31] The treatment of his appeal to the GD by the Tribunal forms a reasonable basis upon which to assert a breach of procedural fairness and natural justice.

[32] 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.

[33] 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

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

[35] 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