Citation: ***C. A. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1458**

Date: December 21, 2015

File number: AD-15-922

APPEAL DIVISION

Between:

C. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On July 28, 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 determined that the Applicant had been over paid for employment insurance (EI) sickness benefits because she had been paid sick leave by an employer which amounts had not been disclosed and allocated previously. The Applicant made a request for reconsideration of the Commission's decision to allocate earnings to a period on claim. On the request for reconsideration, the Commission maintained its decision.

BACKGROUND FACTS

[3] The reconsideration decision was dated October 6, 2014 and stated that the Applicant had until 30 days after she received this decision to file an appeal.

[4] The Applicant filed a Notice of Appeal (NoA) with the Tribunal on November 7, 2014 which the Tribunal considered as incomplete because the reconsideration decision was not attached to the NoA and the grounds of appeal were not stated.

[5] The Tribunal asked the Applicant, by letter dated November 21, 2014, to provide the reconsideration decision and other information "without delay". She sent the reconsideration decision, a statement of the grounds of appeal and other information to the Tribunal, and the Tribunal date stamped receipt of the documents on December 5, 2014. The Tribunal treated the appeal as a complete appeal as of December 5, 2014.

[6] By letter dated December 10, 2014, the Tribunal advised the Applicant that she needed to make a request for an extension of time by January 9, 2015 and to provide a written explanation addressing all of the following:

a) Whether there was a continued intention to pursue the appeal;

b) Whether the matter discloses an arguable case;

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

d) Whether there would be prejudice to the other parties in extending the deadline.

[7] The Applicant replied by letter dated January 3, 2015, with brief statements in relation to each of the four points requested. This letter was date stamped January 9, 2015 by the Tribunal.

[8] On July 28, 2015, the GD refused the extension of time, by written decision (GD decision) which was communicated to the Applicant under cover of letter dated July 28, 2015.

[9] The Applicant received the GD decision on August 5, 2015 and filed an application for leave to appeal (Application) to the Appeal Division (AD) of the Tribunal on August 19, 2015, within the 30-day time limit.

ISSUES

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

LAW AND ANALYSIS

[11] 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.

[12] 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".

[13] 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".

[14] 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.

[15] 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.

[16] The Applicant relies on each paragraph of subsection 58(1) of the DESD Act, and she submits that:

a) The GD failed to consider any of the evidence in her appeal including records of earning;

b) The GD decision was based on errors of fact; and

c) The Commission and the GD failed to recognize that the Applicant had two jobs and was relying on records of earnings from both of them to establish an EI claim.

[17] 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.

[18] 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.

[19] The GD decision noted under the heading “Evidence”:

> [15] On October 6, 2014 the Commission notified the claimant that their decision of June 24, 2014 was unchanged and being maintained.

[16] On November 21, 2014 the claimant filed an incomplete appeal with the Tribunal.

[17] On December 5, 2014 the claimant filed a complete appeal with the Tribunal.

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

[20] 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
[21] The claimant's Request for Reconsideration was rejected on October 6, 2014. The claimant appealed to the Tribunal on December 5, 2014. There is no evidence of any other communication with or from the claimant during the period from October 6, 2014 to December 5, 2014.

Arguable Case
[22] The claimant did not have an arguable case.

Reasonable Explanation for the Delay

[23] The claimant provided no evidence to explain the delay in filing her appeal with the Tribunal.

Prejudice to the Other Party
[24] The Commission did not provide any evidence for or against any prejudice that may occur if an extension of time were to be granted.

[21] The GD decision concluded:

[30] The claimant failed to meet three of the criteria for which an extension may be granted. She 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.

[22] 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.

[23] 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 [3] to [5] above.

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

[25] 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.

[26] I note that the NoA before the GD is dated November 4, 2014 and date stamped November 4, 2014, by the Tribunal. The NoA was filed with the GD of the Tribunal within the appeal period with 10 pages of documents attached, but it was missing a copy of the reconsideration decision and box C (reasons for appeal) was not completed. The Appellant was asked, by letter dated November 21, 2014, to provide a copy of the reconsideration decision and reasons for the appeal "without delay", and she did so on December 5, 2014.

[27] The November 21, 2015 Tribunal letter warned that if the requested information was not provided "within the timeframe specified above", the Applicant would be required to request an extension of time.

[28] While I would have thought that the information being provided on December 5, 2014 was "without delay" and "within the timeframe specified", the Applicant was required to request and extension of time and provide an explanation for the delay. She complied.

[29] In the circumstances, whether the treatment of the Applicant's appeal before the GD breached the principles of procedural fairness should be considered.

[30] 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.

[31] 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

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

[33] 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