



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. A. v. Canada Employment Insurance Commission*, 2016 SSTADEI 125

Tribunal File Number: AD-15-96

BETWEEN:

R. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: March 7, 2016

REASONS AND DECISION

INTRODUCTION

[1] On February 4, 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 lost his employment as a result of his own misconduct. The Applicant made a request for reconsideration of the Commission's decision. The Commission maintained its initial decision.

BACKGROUND FACTS

[3] The reconsideration decision was dated July 21, 2014, and it stated that the Applicant had until 30 days after he received this decision to file an appeal.

[4] The Applicant filed an "Application to Appeal to the Appeal Division" with Service Canada on August 11, 2014. The Tribunal received this document on August 25, 2014 and treated it as a Notice of Appeal (NoA) to the GD. However, the NoA was considered as incomplete because the reconsideration decision was not attached and the date of receipt of the reconsideration decision was not specified.

[5] The Tribunal asked the Applicant, by letter dated August 27, 2014, to provide the reconsideration decision and other information "without delay". He sent the reconsideration decision and other information to the Tribunal, and the Tribunal date stamped receipt of the documents on September 18, 2014. The Tribunal treated the appeal as a complete appeal as of September 26, 2014.

[6] By letter dated September 26, 2014, the Tribunal advised the Applicant that he needed to make a request for an extension of time by October 26, 2014 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 with brief statements in relation to each of the four points requested. This letter was date stamped as received on October 10, 2014, by the Tribunal.

[8] On February 4, 2015, the GD refused the extension of time, by written decision (GD decision) which was communicated to the Applicant under cover of letter dated February 5, 2015.

[9] The Applicant received the GD decision on February 8, 2015 and filed an application for leave to appeal (Application) to the Appeal Division (AD) of the Tribunal on March 4, 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 paragraph (c) of subsection 58(1) of the DESD Act, and he submits that:

- a) The GD decision was based on errors of fact that were made in a perverse or capricious manner or without regard to the material before it; and
- b) He did provide a reasonable explanation for the delay and arguments on there being an arguable case.

[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”:

[18] On July 21, 2014 the Commission notified the claimant their decision had not changed following his Request for Reconsideration.

[19] On August 27, 2014 the claimant filed an incomplete appeal with the Tribunal.

[20] On September 26, 2014 the claimant's appeal with the Tribunal was complete.

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

[23] 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

[24] The claimant's Request for Reconsideration was rejected on July 21, 2014. The claimant appealed to the Tribunal on September 26, 2014. There is no evidence of any other communication with or from the claimant during the period from July 21, 2014 to September 26, 2014. There is no evidence of any intention to pursue the appeal.

Arguable Case

[25] The claimant did not have an arguable case.

Reasonable Explanation for the Delay

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

Prejudice to the Other Party

[27] The Commission did not provide any evidence for or against any prejudice that may occur if an extension of time were to be granted. However, given the short period of time, it is unlikely any prejudice would be suffered.

[21] The GD decision concluded:

[28] 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.

[29] 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 findings seem at odds with the GD file as detailed in paragraphs [3] to [8] above.

[24] I note that the NoA before the GD is dated August 7, 2014 and date stamped August 11, 2014, by Service Canada. The NoA was received by the Tribunal on August 25, 2014. The reconsideration decision was dated July 21, 2014 and stated that the Applicant had until 30 days after he received this decision to file an appeal. The reconsideration decision would have taken days to reach the Applicant by regular mail.

[25] Therefore, I find that the NoA was filed with the GD of the Tribunal within the 30-day period, but it was missing a copy of the reconsideration decision and the date that it was received. The Applicant was asked, by letter dated August 27, 2014, to provide a copy of the reconsideration decision "without delay", and he did so on September 18, 2014.

[26] The September 26, 2014 Tribunal letter warned that if an explanation of the delay in filing NoA was not provided by October 26, 2014, the GD Member would grant or refuse the request for an extension of time based on the information already in the file.

[27] The Applicant replied by letter with information on each of the points requested. This letter was date stamped October 10, 2014 by the Tribunal.

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

[29] On the grounds that there may be a breach of natural justice 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.

[30] 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

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

[32] 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