



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. D. v. Canada Employment Insurance Commission*, 2016 SSTADEI 119

Tribunal File Number: AD-15-61

BETWEEN:

**L. D.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY:: Shu-Tai Cheng

HEARD ON: January 12, 2016

DATE OF DECISION March 1, 2016

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

Appellant (Claimant)

L. D.

Representative for the Respondent (Commission) Carole Robillard

### INTRODUCTION

[1] On February 3, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) refused an extension of time to appeal to the GD from a reconsideration decision of the Canada Employment Insurance Commission (Commission).

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on February 17, 2015 and leave to appeal was granted on September 18, 2015.

[3] This appeal proceeded by Teleconference for the following reasons:

- a) The lack complexity of the issue(s) under appeal; and
- b) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The parties each filed written submissions which mainly argued the matter on the merits of the allocation of undeclared earnings.

### ISSUES

[5] Whether the GD made an error of law, erroneous findings of fact or breached a principle of natural justice in arriving at its decision refusing an extension of time for the Appellant to appeal to the GD.

[6] Whether the AD should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision of the GD.

## **LAW AND ANALYSIS**

[7] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) the only grounds of appeal are that:

- 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.

[8] Leave to appeal was granted on the basis that the Appellant had set out reasons which fall into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraphs 58(1)(b) and (c) of the DESD Act.

[9] In particular, the decision granting leave to appeal stated:

[12] In the GD decision refusing an extension of time, the Member found that:

[22] The claimant's Request for Reconsideration was rejected on September 18, 2014. The claimant appealed to the Tribunal on November 3, 2014. There is no evidence of any other communication with or from the claimant during the period from September 18, 2014 to November 3, 2014.

[13] The emphasis is mine to indicate where the GD Member appears to have misapprehended the date that the Applicant's appeal was filed. This would be a fundamental error, as the appeal to the GD may not actually have been filed late.

[14] The GD Member relies on this finding to conclude that the Applicant did not indicate a continuing intention to pursue the appeal.

[15] In addition, although I make no findings on the issue at this time, I note on the face of the record that the GD Member may not have applied the correct test to be used where an extension of time is requested. While the GD decision refers to the *Gattellaro* factors and the overriding consideration being that of the interests of justice being served, the GD Member concluded:

[26] 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.

[16] The *Gattellaro* factors were referred to but the overriding consideration of the interests of justice does not appear to have been applied. If shown to be true, this could also result in a successful appeal.

[17] Considering the possible error in findings of fact (made in a perverse or capricious manner or without regard for the material before it) and possible error of law, and my review of the GD decision and docket, I am satisfied that the appeal has a reasonable chance of success.

[10] The Respondent submits that either the Appellant's Notice of Appeal was not late before the GD or that the extension of time should have been granted by the GD. It maintains, however, that the case has no reasonable chance of success on the merits, but submits that the AD should refer the matter back to the GD as the case has not been decided on the merits.

[11] The Appellant made submissions relating to the impact of having to repay the amounts said to be owing due to a reallocation of earnings.

[12] The issue before me is the GD's decision to refuse an extension of time. There is no substantive decision from the GD in relation to the reallocation of earnings.

[13] The GD found that there was no continuing intention to pursue the appeal on the basis that there was no evidence of any communications from the Appellant from September 18, 2014 (reconsideration decision) to November 3, 2014 (completed appeal). This finding was wrong. The Notice of Appeal to the GD was filed on October 10, 2014, and a copy of it was on file. The November 3, 2014 version of the Notice of Appeal was a second copy sent to the Tribunal and "originally faxed Oct 10" is handwritten on the top of the November 3 document.

[14] The GD found that the Appellant provided no evidence to explain the delay in filing her appeal with the Tribunal. This finding was also wrong. The Applicant maintained throughout that the Application was not late.

[15] The GD concluded that the Applicant did not have an arguable case. However, there is no analysis of the merits of the case, only a cursory statement “the claimant did not have an arguable case”. Reasons should be understandable, sufficiently detailed and provide a logical basis for the decision. The reasons in the GD decision on this issue were not.

[16] The GD mechanically applied the *Gattallero, supra*, factors, which is an error of law. The findings of fact made by the GD on continuing intention and explanation for delay were wrong.

[17] Therefore, the GD decision was based on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it and on errors of law.

[18] Subsection 59(1) of the DESD Act sets out the powers of the AD. It states:

The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[19] Considering the submissions of the parties, my review of the GD decision and the appeal file, I allow the appeal. Because this matter has not been heard on the merits and may require the parties to present evidence, a hearing before the GD is appropriate.

## **CONCLUSION**

[20] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration.

Shu-Tai Cheng  
Member, Appeal Division