



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. J. v. Canada Employment Insurance Commission*, 2016 SSTADEI 135

Tribunal File Number: AD-15-394

BETWEEN:

**K. J.**

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

DATE OF DECISION: March 10, 2016

## **REASONS AND DECISION**

### **INTRODUCTION**

[1] On May 29, 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 voluntarily left his employment, failed to supply his correct, last record of employment and reason for separation, and it had imposed a penalty and issued a notice of violation. The Applicant made a late request for reconsideration of the Commission's decision. The Commission maintained its initial decision and did not reconsider its decision because the request was late.

### **BACKGROUND FACTS**

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

[4] The Applicant filed a Notice of Appeal (NoA) with the Tribunal on February 6, 2015. It stated that he received the reconsideration decision on February 2, 2015 and attached a copy of it as well as an explanation for the delay in filing his NoA.

[5] By letter dated March 24, 2015, the Tribunal advised the Applicant that he needed to provide the following information, by April 24, 2015:

Outline the reasons as to why you feel you have an arguable case.

1. The Appellant must demonstrate a continuing intention to pursue the appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[6] It is unclear from the record whether the Applicant replied to this letter. However, his NoA, as filed in February 2015, included a two page letter, the first page of which explains the delay in filing the NoA and the second page of which outlines why he feels he has an arguable case.

[7] On May 29, 2015, the GD refused the extension of time, by written decision (GD decision) which was communicated to the Applicant under cover of letter dated June 1, 2015.

[8] The Applicant filed an application for leave to appeal (Application) to the Appeal Division (AD) of the Tribunal on June 23, 2015, within the 30-day time limit.

[9] On December 2, 2015, the Tribunal asked the Applicant to complete the Application by providing reasons for the appeal. The Applicant replied on January 16, 2016.

## **ISSUE**

[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 states that he is “just looking for justice”. The Application requests that his appeal be looked at on the merits rather than only on delay. For the most part, the Applicant makes submissions on the merits of the appeal before the GD and not what errors the GD may have made in arriving at its decision.

[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”:

[14] On December 3, 2014 the Commission notified the claimant that their decision was being maintained. The Commission will not be reconsidering its decision as a claimant may request a reconsideration of a Commission decision within 30 days after the day on which the decision was communicated to the claimant. On the date he requested reconsideration, more than 30 days had passed since the decision was communicated to him. The Commission had considered the explanation he provided with respect to the delay in requesting reconsideration and determined that it does not meet the requirements of the Reconsideration Request Regulations.

[15] On February 6, 2015 the claimant filed an appeal with the Tribunal. With his appeal, the claimant stated the letter notifying him of the Commission's decision did not arrive so he applied late for his appeal.

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

[18] 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**

[19] The claimant's Request for Reconsideration was rejected on December 3, 2014. The claimant appealed to the Tribunal on February 6, 2015. There is no evidence of any other communication with or from the claimant during the period from December 3, 2014 to February 6, 2015.

#### **Arguable Case**

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

#### **Reasonable Explanation for the Delay**

[21] The claimant provided no evidence to explain the delay in filing his appeal with the Tribunal. His evidence was that a notification letter was misdirected in the mail. He submitted no evidence that there were mail delivery problems between the claimant and the Commission for any other communication.

#### **Prejudice to the Other Party**

[22] 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:

[23] 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.

[24] 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] In addition, the Applicant did provide further information to explain the delay. Attached to the NoA, the Applicant wrote a letter which stated that: having not received a reply from the Commission (to his request for reconsideration of September 2014), he followed up and spoke with a HRDC officer in January 2015. The officer mailed the reconsideration decision to the Applicant (date stamped by the post office on January 13, 2015), and he received it on February 2, 2015.

[24] Therefore, the GD's conclusion that the Applicant did not provide evidence to explain the delay in filing his appeal also warrants review.

[25] On the grounds that there may be an 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.

[26] 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**

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

[28] 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