



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. J. v. Canada Employment Insurance Commission*, 2016 SSTADEI 163

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

HEARD ON: On the Record

DATE OF DECISION: March 24, 2016

## REASONS AND DECISION

### INTRODUCTION

[1] On March 10, 2016, the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) granted leave to appeal on the grounds of erroneous findings of fact. The decision of the General Division (GD) appealed from relates to the refusal of an extension of time for the Appellant to file an appeal before the GD.

[2] The Tribunal requested the parties' submissions on the mode of hearing, whether one is appropriate and, also, on the merits of the appeal.

[3] The Respondent filed submissions which recommend that, in the interest of procedural fairness, the matter be returned to the GD to be heard on the substantive issues, which are the disqualification, penalty and violation imposed by the Commission.

[4] In light of the Respondent's submissions, it was unnecessary for the Appellant to make submissions.

[5] This appeal proceeded on the basis of the record for the following reasons:

- a) The lack of 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.

[6] In the circumstances, it is unnecessary to hold an oral hearing at the AD.

### ISSUES

[7] Whether the GD 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] 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

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[10] 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 paragraph 58(1)(c) of the DESD Act.

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

[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.

[12] The GD refused to grant an extension of time based on a mechanical application of the *Gattallero* factors (*Canada (Minister of Human Resources Development) v. Gattallero*, 2005 FC 883). It found no evidence of the Applicant's continuing intention to pursue the appeal, no reasonable explanation for the delay and no arguable case.

[13] The Respondent submitted that the Applicant did provide a reasonable explanation for the delay. I agree, based on my review of the file.

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

[15] 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.

[16] 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**

[17] 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