



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *F. S. v. Canada Employment Insurance Commission*, 2016 SSTADEI 290

Tribunal File Number: AD-16-231

BETWEEN:

**F. S.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Leave to Appeal**

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DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 20, 2016

## REASONS AND DECISION

### INTRODUCTION

[1] On December 11, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) refused an extension of time. An extension of time was needed for the Applicant to appeal of a decision of the Canada Employment Insurance Commission (Commission). The Applicant had received employment insurance sickness benefits during the period of May to August 2014. The Commission had determined that he had received benefits through his employer's benefit plan and that these payments were considered earnings and would be deducted from his benefits. Allocation of these earnings resulted in an overpayment of 12 weeks of sickness benefits that the Applicant had received. The reconsideration decision was dated October 30, 2014.

[2] The Applicant appealed to the GD of the Tribunal. He filed an incomplete Notice of Appeal (NoA) on February 3, 2015. The NoA was filed beyond the time period allowed for appeal of a reconsideration decision to the GD.

[3] The Tribunal advised the Applicant, by letter dated February 5, 2015, what was required to complete the appeal. He did not respond until September 17, 2015 and filed the information necessary to complete the appeal on September 28, 2015.

[4] The Tribunal asked the Applicant to provide a written explanation for his delay in filing a complete NoA, by letter dated November 6, 2015. He called the Tribunal and was given a verbal explanation of what was required to answer the questions asked in the letter. The Applicant did not provide a response by the deadline of December 7, 2015.

[5] The GD determined that:

- a) The information missing to complete his appeal was a copy of the reconsideration decision;
- b) The Applicant did not demonstrate a continued intention of pursuing the appeal;

- c) The Applicant did not demonstrate that he has an arguable case;
- d) The Applicant did not provide a reasonable explanation for the entire delay; and
- e) There would be no prejudice to the Commission.

Based on these conclusions, the GD refused an extension of time within which to file an appeal.

[6] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on February 1, 2016. He received the GD decision on January 14, 2016 and filed the Application within the 30 day time limit.

[7] The Tribunal requested that the Applicant provide reasons for the appeal. The Applicant replied within the requested time.

## **ISSUE**

[8] Whether the appeal has a reasonable chance of success.

## **LAW AND ANALYSIS**

[9] 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”.

[10] 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.”

[11] 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.

[12] The Applicant's grounds of appeal are that he is "entitled to EI" and that Commission staff made errors on his claim. The arguments of Applicant can be summarized as follows:

- a) He paid his EI premiums;
- b) He was told by Commission staff that he could draw EI while receiving private insurance;
- c) He should not be punished financially for errors created by the Commission; and
- d) He has provided, as an attachment to the Application, the answers to the questions asked of him in November 2015 to explain his delay in filing his NoA before the GD.

[13] The Applicant did not refer to any of the grounds of appeal enumerated in subsection 58(1) of the DESD Act. He did state, when asked to provide his reasons for appeal that he finds it very hard to understand what that ("reasons for appeal") means.

[14] 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 (Attorney General)*, 2010 FCA 63.

[15] 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.

[16] 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 *Gattellero* factors which, if made out, would be an error of law.

[17] Further, it concerns me that the GD concluded that the appeal had no reasonable chance of success on the basis that the Applicant did not “question any error in law that is unreasonable in light of the information in the file” and that the only missing information to complete the appeal was a copy of the reconsideration decision which the GD had on file. An appeal to the GD might have a reasonable chance of success based on errors other than an error in law. That the missing information was a document which the GD had on file should have been considered in an analysis of whether the interests of justice would be served by allowing an extension of time.

[18] On the grounds that there may be an error of law and erroneous findings of fact made in a perverse or capricious manner or without regard to the material before the GD, I am satisfied that the appeal has a reasonable chance of success.

[19] 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**

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

[21] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, on the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng  
Member, Appeal Division