



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 409

Tribunal File Number: AD-16-713

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: August 10, 2016

REASONS AND DECISION

DECISION

[1] The appeal is granted and the file returned to the General Division (Employment Insurance Section) for a hearing on the substantive issue.

INTRODUCTION

[2] On April 28, 2016, the General Division of the Tribunal decided that:

- An extension of time for the Appellant to appeal to the General Division of the Social Security Tribunal was refused.

[3] The Appellant was deemed to have requested leave to appeal to the Appeal Division on May 20, 2016. Leave to appeal was granted on July 14, 2016.

TYPE OF HEARING

[4] The Tribunal decided to render a decision on the record pursuant to section 43 (a) of the *Social Security Tribunal Regulations*.

THE LAW

[5] 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.

ISSUE

[6] The Tribunal must decide if the General Division erred when it concluded that an extension of time for the Appellant to appeal to the General Division Tribunal was to be refused.

ARGUMENTS

[7] The Appellant submits the following arguments in support of his appeal:

- The agent of the Respondent rendered a reconsideration decision that was never communicated to him even if he was the representative of the Appellant on file. He submits that the problems with the delay in filing the appeal to the General Division started at that moment;
- The Representative was later overburden with work during the tax season and did not have time to answer the letter of the General Division dated March 23, 2016, that was requesting information regarding the delay in filing the appeal to the General Division; A decision was rendered by the General Division immediately after the expiration of the delay to reply;
- The Representative is asking the Tribunal to reconsider the delay to appeal since it was not the fault of the Appellant if his representative did not have time to respond on his behalf;
- The General Division should have granted the extension of time in the interest of justice.

[8] The Respondent submits the following arguments against the appeal:

- The appeal was filed within the timelines permitted under subsection 52(2) of the *DESD Act*;
- Furthermore, having reviewed the submissions of the Appellant's representative in the leave to appeal application and taking consideration of the four factors

outlined in the *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883 decision as well as the *Canada (AG) v. Larkman*, 2012 FCA 204 decision, the Respondent is of the opinion that the extension of time to file an appeal before the General Division should be granted.

STANDARD OF REVIEW

[9] The parties did not make any representations regarding the applicable standard of review;

[10] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that “[w]hen it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court.”

[11] The Federal Court of Appeal further indicated that:

[n]ot only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[12] The Court concluded that “[w]he[n] it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that *Act*.”

[13] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (AG)*, 2015 FCA 274.

[14] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

ANALYSIS

[15] The Appellant was first denied benefits pursuant to subsection 18.1(a) of the *Employment Insurance Act* at the initial level and on October 27, 2015 following the reconsideration process.

[16] The Appellant filed his appeal at the General Division on February 26, 2016 outside the legal delays.

[17] The legislation has given the discretionary power to extend the time for appeal to the General Division.

[18] In the present matter, the General Division concluded that the Appellant failed to meet three of the criteria for which an extension may be granted. The General Division found that the Appellant did not indicate a continuing intention to pursue the appeal, did not have an arguable case and provided no reasonable explanation for the delay.

[19] In order for the Appellant to succeed in his appeal, he must show that the General Division improperly exercised its discretion to deny the extension of time. An improper exercise of discretion occurs when a Member gives insufficient weight to relevant factors, proceeds on a wrong principle of law, erroneously misapprehends the facts, or where an obvious injustice would result.

[20] The Tribunal finds that the General Division did not exercise its discretion properly in the present case. The General Division gave insufficient weight to relevant factors, erroneously misapprehended the facts and the denial of the extension results in an obvious injustice.

[21] It is clear from the file that the Appellant's representative never received the reconsideration decision of the Respondent although he was the designated representative on file. This is a reasonable explanation as to why the appeal to the General Division was not filed within the legal delays.

[22] Considering the above, the General Division could not properly conclude that the Appellant did not indicate a continuing intention to pursue the appeal.

[23] The Appeal Division further reiterates that the *Gattalero* factors are not to be applied mechanically by the General Division. The overriding factor is still the interest of justice - *X (Re)*, 2014 FCA 249, *Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263 (F.C.A.). In this case, it would certainly not be in the interest of justice that a claimant be denied an appeal following the impossibility of a designated representative to file an appeal within the legal delays.

[24] For the above mentioned reasons, the appeal will be allowed, the extension of time to file the appeal at the General Division will be granted and the file returned to the General Division for a hearing on the substantive issue.

CONCLUSION

[25] The appeal is allowed, the extension of time to file the appeal to the General Division is granted and the file returned to the General Division for a hearing on the substantive issue.

Pierre Lafontaine
Member, Appeal Division