



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. D. v. Canada Employment Insurance Commission*, 2016 SSTADEI 572

Tribunal File Number: AD-16-530

BETWEEN:

**S. D.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Mark Borer

HEARD ON: December 13, 2016

DATE OF DECISION: December 16, 2016

## **DECISION**

[1] The appeal is allowed. The required extension of time is granted, and the matter is returned to the General Division to be heard.

## **INTRODUCTION**

[2] Previously, a member of the General Division declined to exercise his jurisdiction to grant an extension of time to appeal from a previous determination of the Commission.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] A teleconference was held. The Appellant attended and made submissions, but the Commission did not. For reasons known only to the Commission, they instead informed the Tribunal in writing that they would not be attending.

## **THE LAW**

[5] According to subsection 58(1) of the *Department of Employment and Social Development 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.

## **ANALYSIS**

[6] This appeal concerns whether or not the Appellant should be granted an extension of time to appeal to the General Division.

[7] Among other grounds, the Appellant submits that based upon poor advice from Service Canada he mistakenly filed a second reconsideration request rather than an appeal with the Tribunal. He therefore maintains that, contrary to the findings of the General Division member, he had a continuing intention to appeal. He also repeats his assertion that his underlying appeal is well founded, and asks that I allow his appeal.

[8] The Commission, in their written submissions, supports the General Division member's decision but unhelpfully does not address any of the Appellant's specific arguments.

[9] In a lengthy decision, the General Division member correctly stated the law to be applied in cases where an extension of time is requested. He then noted that the Appellant had tried to request a second reconsideration before the expiry of the 30-day appeal period. Nevertheless, he concluded that this did not evidence a continuing intention to appeal or a reasonable explanation for the delay in filing the appeal. Continuing, he also found that the Appellant had no arguable case. Considering all the factors he had identified, he concluded (at paragraph 41) that "the overriding consideration that the interest of justice has been served [sic]" and dismissed the appeal.

[10] I have great difficulty with these conclusions.

[11] First, I fail to understand how the member could conclude that an attempt to challenge a decision in a timely manner but in the wrong way did not constitute a continuing intention to appeal.

[12] Second, I note that the Commission has once again failed to apply *Canada (Attorney General) v. Picard*, 2014 FCA 46, in determining the length of the disentitlement for being outside of Canada. Obviously, the Commission failure to apply *Picard* establishes that there was indeed an arguable case to be made in appealing the Commission reconsideration decision. This stands in stark contrast to the General Division member's finding to the contrary.

[13] Given the above, I cannot but conclude that the member failed to exercise his discretion in a judicial manner and that I am obligated to intervene.

[14] In *X (Re)*, 2014 FCA 249, the Federal Court of Appeal (at paragraph 26) set out the test to be applied in late appeals in a most clear and succinct form:

“In deciding whether to grant an extension of time to file a notice of appeal, the over-riding consideration is whether the interests of justice favour granting the extension. Relevant factors to consider are whether:

- (a) there is an arguable case on appeal;
- (b) special circumstances justify the delay in filing the notice of appeal;
- (c) the delay is excessive; and
- (d) the respondent will be prejudiced if the extension is granted.”

[15] I find that although the Appellant did not appeal in the correct manner, he intended to do so within the 30-day appeal period and thereby demonstrated a continuing intention. I further find that the Applicant has therefore offered a clear explanation for his late filing which I accept and which establishes special circumstances that justify the delay.

[16] The delay was not excessive, nor would the Commission be prejudiced if the extension is granted. And as I have already found that the Commission did not apply *Picard* and thereby incorrectly determined the length of the disentitlement for being outside of Canada, an arguable case has been established.

[17] For these reasons and taking into account the interests of justice, I shall give the decision that the General Division member should have given and grant the extension of time.

## **CONCLUSION**

[18] For the above reasons, the appeal is allowed. The required extension of time is granted, and the matter is returned to the General Division to be heard.

*Mark Borer*

Member, Appeal Division