Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. T. v. Canada Employment Insurance Commission,* 2017 SSTADEI 91

Tribunal File Number: AD-16-438

BETWEEN:

S. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: November 24, 2016

DATE OF DECISION: March 3, 2017

Canada

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 and the Commission each attended and made submissions. The Appellant was represented by counsel.

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] The Appellant argues that the General Division member erred when he declined to grant an extension of time. Although the Appellant agrees that the member determined appropriate criteria to assess whether or not it was in the interests of justice to grant the extension of time, he submits that these criteria were not properly considered.

[8] In his decision, the General Division member correctly noted *Canada (Attorney General) v. Larkman*, 2012 FCA 204, and considered four entirely appropriate factors: Did the Appellant demonstrate a continuing intention to appeal, had the Appellant raised an arguable case, was there a reasonable explanation for the delay, and whether there would be any prejudice to the other party in granting the extension of time.

[9] The member then found that although there would be no prejudice to the Commission if an extension of time was granted, the Appellant did not have a continuing intention, did not show a reasonable explanation for the delay, and did not have an arguable case. The General Division member then refused to grant the required extension.

[10] For their part, the Commission concedes that although the Appellant did not raise an arguable case, the Appellant did demonstrate (contrary to the General Division member's findings) a continuing intention to appeal and did provide a reasonable explanation for the delay.

[11] I agree with the parties that errors were made by the General Division member. I note, for example, that although the General Division member correctly cited *Larkman*, at no point did he consider the interests of justice as that case requires.

[12] This is an error of law which I am obligated to intervene to correct.

[13] The parties have asked that I give the decision that the General Division should have given, and in the circumstances of this case I am prepared to do so.

[14] In his submissions to the General Division, the Appellant argued that he was late because he had attempted (successfully) to retain counsel to assist in his appeal. I find myself in agreement with the parties that this is a reasonable explanation for the relatively short delay in filing, and that the Appellant also demonstrated a continuing intention to

appeal. I also agree that there would be no prejudice to the Commission if an extension of time was granted.

[15] Of greater importance, however, is whether or not the Appellant has presented a case which has a reasonable chance of success (an arguable case).

[16] Essentially, the Appellant argued in his appeal to the General Division member that he did not voluntarily leave his employment. Although I make no finding on the underlying merits of this argument, it cannot be disputed that if this was accepted the appeal would succeed.

[17] As this is the basic criteria for determining whether or not an appeal has a reasonable chance of success, I find that the Appellant's arguments have met the required threshold.

[18] Having found that the Appellant has demonstrated a continuing intention to appeal, provided a reasonable explanation for the delay, raised an arguable case, and that there would be no prejudice to the Commission if an extension of time was granted, I have no hesitation in deciding that, in the interests of justice, an extension of time should be granted.

[19] Although the above is sufficient to dispose of this appeal, there remains one issue to address.

[20] In his written submissions, as well as at the hearing before me, Jacob de Klerk of Neighbourhood Legal Services (counsel for the Appellant) argued that the General Division member exhibited actual bias by "uncritically" accepting the Employer's version of events over that of his client. The application for leave to appeal (at AD1-5) phrased it this way:

> The General Division [member] consistently portrayed [the Applicant] as a free loader, as one who was looking for ways to scam and manipulate the system to try to get income without having to work.

[21] I note that notwithstanding the above submission, neither Mr. de Klerk nor the Appellant ever met or spoke with the General Division member, nor does the member's decision say anything even remotely similar to the above allegation.

[22] In my leave to appeal decision, I observed (beginning at paragraph 5) that:

> Allegations of bias go to the heart of the administrative law system and, as stated by the Federal Court of Appeal in *Joshi v. Canadian Imperial Bank of Commerce*, 2015 FCA 92, at paragraph 10:
>
> > "[B]ias is a term with a precise legal definition. Allegations of bias are of a very serious nature and should not be made without proof… Such allegations are particularly egregious when made against judges, as they attack one of the pillars of the judicial system, namely the principle that judges are impartial as between the parties who appear before them…"
>
> The above applies equally to Tribunal members.

[23] I also noted (at paragraph 7 of my leave to appeal decision) that I "expect[ed] and require[d]" the Appellant to provide written evidence to substantiate the allegation of bias.

[24] No such evidence was presented, either in written form or at the hearing.

[25] I find that there is absolutely no reason to question the integrity of the General Division member. I am extremely disappointed that Mr. de Klerk, a member of the Law Society of Upper Canada, persisted with this allegation at the hearing without providing any evidence to support it.

[26] I have found for the reasons previously stated that the General Division decision was flawed, and have allowed this appeal. But I feel obliged to say that in my view it is inappropriate for an officer of the courts to bring and maintain an allegation of bias against an independent quasi-judicial decision maker (such as a General Division member) without evidence to support that allegation. Such allegations have the potential to undermine public confidence in the administrative justice system and should not be made lightly or routinely.

CONCLUSION

[27] 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