



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *E. H. v. Canada Employment Insurance Commission*, 2017 SSTADEI 249

Tribunal File Number: AD-16-833

BETWEEN:

**E. H.**

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: June 20, 2017

DATE OF DECISION: June 29, 2017

## **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 Commission and attended and made submissions, but the Appellant did not. As the Appellant had personally signed for the notice of hearing, I proceeded in her absence.

[5] Subsequent to the hearing, but before this decision was issued, the Appellant contacted the Tribunal and asked that she be granted another chance to attend a hearing. She indicated that she had been unable to attend because she had been sick on the day of the hearing.

[6] Notwithstanding the Appellant's failure to attend her hearing, I find that this appeal must succeed. Given this fact, the Appellant's request is moot and need not be considered further.

## **THE LAW**

[7] 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**

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

[9] As I noted in my leave to appeal decision, the Appellant did not make any submissions with a reasonable chance of success. Notwithstanding this, however, on the face of the record the General Division member has erred in his determination as to whether or not an extension of time should be granted.

[10] The decision whether or not to grant an extension of time is a discretionary one. This means that I cannot intervene unless the General Division member erred in law, considered irrelevant factors, failed to consider relevant factors, or an obvious injustice would result.

[11] At the hearing before me, the Commission admitted that they failed to apply *Canada (Attorney General) v. Picard*, 2014 FCA 46, in determining the length of the Appellant's disentitlement for being outside of Canada as they should have done.

[12] In his decision, the General Division member identified a number of entirely proper factors which he chose to consider in determining whether or not it was in the interests of justice to grant an extension of time. Ultimately, the member determined that the Appellant did not have an arguable case. This fact, in conjunction with a number of other factors, led the member to determine that an extension of time to appeal was not in the interests of justice.

[13] I agree with the Commission that *Picard* should have been followed and that for this reason the General Division member had no choice but to find that the Appellant had an arguable case. In fact, the Appellant's appeal was a certainty, because there is no doubt (as

the Commission now agrees) that the Commission's decision must be amended to take into account the judgment of the Court in *Picard*.

[14] It is very disconcerting to me that years after this Federal Court of Appeal decision was released the Commission (and, to a lesser extent, the General Division) has failed to apply it. Many cases before me only involve applying *Picard* with no other identifiable error, necessitating an entirely avoidable, costly, and time-consuming appeal process.

[15] To be clear, the jurisprudence of the Court is binding upon the Commission and the Tribunal equally. It must be considered and applied in every case.

[16] Even though the unrepresented Appellant did not raise the *Picard* issue, it was the duty of the General Division member to identify this Commission error. Failing to do so is an error of law. Because of this, the refusal to grant an extension of time has resulted in an obvious injustice. These are each errors which I am obligated to intervene to correct.

[17] As there can really be only one outcome, there is little purpose in returning the matter to the General Division for reconsideration. Instead, I shall give the decision that the General Division member should have given: in the interests of justice, I grant the required extension of time so that *Picard* can be considered and applied by the General Division as required by the Court.

[18] In closing, I note that the only issue under appeal before me is the request for an extension of time to file an appeal. I therefore have no jurisdiction to make any substantive findings regarding the bulk of the Appellant's appeal. As established by Parliament, it is for the General Division to hold a hearing in this matter, to take evidence, and to determine what must be done to correct any errors which may or may not be found in the initial determination of the Commission

[19] That being said, I would **strongly** encourage the General Division to consider and apply *Picard* to the facts of this case as presented by the parties.

## **CONCLUSION**

[20] 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