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

Citation: *S. M. v. Canada Employment Insurance Commission,* 2017 SSTADEI 344

Tribunal File Number: AD-16-1077

BETWEEN:

S. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: September 21, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On August 2, 2016, the General Division of the Social Security Tribunal of Canada (the "General Division") refused the Appellant an extension of time to bring his appeal.

[2] An application for leave to appeal the General Division decision was filed with the Appeal Division of the Tribunal (referred to in this decision as the "Tribunal") on August 29, 2016, and leave to appeal was granted on April 21, 2017.

[3] This appeal proceeded on the record for the following reasons:

a) The Member had determined that no further hearing was required.

b) The *Social Security Tribunal Regulations* require that the appeal proceed as informally and as quickly as circumstances, fairness and natural justice permit.

c) There is an apparent error of law on the face of the record.

ISSUE

[4] Has the General Division made a reviewable error as set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act)?

[5] If so, what is the appropriate remedy?

THE LAW

[6] According to subsection 58(1) of the DESD Act, the following are the only grounds of appeal:

> (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.

[7] Section 52 of the DESD Act, reads as follows:

> 52 (1) An appeal of a decision must be brought to the General Division in the prescribed form and manner and within,
>
> (a) in the case of a decision made under the Employment Insurance Act, 30 days after the day on which it is communicated to the appellant; and
>
> (b) in any other case, 90 days after the day on which the decision is communicated to the appellant.
>
> (2) The General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

ANALYSIS

[8] There is no factual dispute as to whether or not the appeal was filed late. There is a question as to how late it was filed.

[9] How late the appeal was filed is a foundational fact on which will hang further findings respecting the Appellant's continuing intention to pursue the appeal, his explanation for the delay and the prejudice to the other party. However, the length of the delay is difficult to discern from the decision.

[10] At par. 36 of the decision, the General Division correctly identifies the April 12, 2016, filing date for the appeal and states that this was beyond 30 days from when the reconsideration decision had been communicated. However, the General Division confused dates and appeared to rely on incorrect dates in other places. At par. 29, the General Division indicates the Appeal was filed on April 28, 2016, and, at par. 46, indicates that the appeal was filed 93 days after the notice of the reconsideration decision of April 12, 2016.

[11] According to the file, the reconsideration decision was issued on January 27, 2016, and the appeal was filed on April 12, 2016, which, calculated correctly, would have been 76 days

after the reconsideration decision. That is not the end of the matter: the date of the reconsideration decision does not initiate the calculation period. The time period to file an appeal commences from the communication of the decision per s.52(1)(*a*).

[12] Despite the General Division's clear statements at par. 3 and par. 36 that it is the *communication date* that is relevant to the calculation; the actual calculation in par. 46 references the date of the reconsideration decision only. At no point did the General Division make a finding as to when the decision was actually communicated or when it may be deemed to be communicated, presumably because of the General Division's apparent reliance on the date of the reconsideration decision. This is an error of law per s.58(1)(*b*) of the DESD Act.

[13] The legal test cited by the General Division is correct: according to the Federal Court of Appeal in *Canada (Minister of Human Resources Development)* v. *Gattellaro*, 2005 FC 883, there are four factors to be considered in determining whether to extend the time period beyond the 30-day limit within which an applicant is required to file an application for leave to appeal. They are as follows:

(a) Whether there is a continuing intention to pursue the application or appeal;
(b) Whether the matter discloses an arguable case;
(c) Whether there is a reasonable explanation for the delay; and
(d) Whether there is prejudice to the other party in allowing the extension.

The General Division referenced *Canada (Attorney General)* v. *Larkman*, 2012 FCA 204 , for the proposition that the overriding consideration is that the interests of justice be served.

[14] The General Division correctly notes at par. 7 that the Federal Court of Appeal found that the question of whether the respondent (in that case) had an arguable case at law is akin to determining whether the respondent, legally, had a reasonable chance of success (referencing *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Minister of Social Development)*, 2010 FCA 63).

[15] *Larkman* also held that not all of the four *Gattellaro* questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour.

[16] Having laid out the correct legal test, the General Division made a number of errors in interpreting and applying the test. The most egregious errors concern the General Division's consideration of the second of the *Gattellaro* factors: whether or not the Appellant had an arguable case.

Arguable case

[17] As noted above, an arguable case is akin to a reasonable chance of success. The Federal Court of Appeal decision in *Lessard-Gauvin c. Canada (Attorney General)*, 2013 FCA 147, explained that, in determining whether there is a reasonable chance of success, the appropriate question is this: "Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing?" This is not the test or standard that the General Division applied in assessing "arguable case."

[18] There were several substantive issues that arise from the reconsideration decision on appeal, namely:

a. that the Appellant has been disentitled to benefits during the period he was absent from Canada pursuant to s.37 of the *Employment Insurance Act* (the "Act") and s.55 of the *Employment Insurance Regulations* (the "Regulations");

b. that the Appellant has been disentitled to benefits for the period in which he was unavailable to prove his availability for work as required by s.18(1)(a) of the Act;

c. that a penalty has been imposed under s.38 of the Act for knowingly providing false or misleading information to the Respondent;

d. that the amount of the penalty has been determined in a judicial manner; and

e. that the decision to issue a notice of violation and the imposition of a Violation by the Respondent under s.7.1(4) of the Act has been determined in a judicial manner.

[19] In order for the arguable case to be regarded as supportive of allowing the late appeal, it would be necessary only for the Appellant to demonstrate an "arguable case" in respect of one of these substantive issues.

[20] In respect of the Appellant's "availability for work" under subsection 18(1), the General Division did not consider whether the appeal has a reasonable chance of success or whether it was instead bound to fail. Rather, at par. 41, the General Division applied a "balance of probabilities" standard: a standard that is significantly more stringent than the "arguable case" or "reasonable chance of success." This is an error of law per s.58(1)(*b*) of the DESD Act.

[21] Likewise, at par. 44, the General Division applied a balance of probabilities standard in determining whether the Appellant had made a representation that he knew was false or misleading and that would result in a penalty under s.38(1)(*a*) of the Act.

[22] Furthermore, the General Division failed to consider whether an arguable case existed in respect of whether the Respondent had exercised its discretion to issue a notice of violation (and to impose a violation as a consequence) in a judicial manner. According to *Gill* v. *Canada (Attorney General)*, 2010 FCA 182, "[…] the Commission did have the discretion under subsection 7.1(4) of the Act whether or not to issue a notice of violation. A notice of violation is not mandatory or automatic under subsection 7.1(4)." In failing to consider whether an arguable case existed in respect of the imposed violation under s.7.1(4) of the Act, the General Division refused to exercise its discretion on an issue properly before it, as required under s.58(1)(*a*) of the DESD Act.

Reasonable explanation for the delay

[23] The General Division also considered whether the Appellant had a reasonable explanation for the delay. It finds, at par. 46, that the Appellant had failed to exercise proper diligence in pursuing his appeal. Then, at par. 47, it indicates that it places "considerable weight" on this factor, presumably weighing against granting the extension of time.

[24] However, there is no finding for the date on which the decision was communicated; the General Division apparently relied on an incorrect date for the date on which the appeal had been filed, and the "delay" calculation is insensible but clearly wrong. In these circumstances, the Tribunal finds that the General Division determined that there was no reasonable explanation for the delay in error and without regard for the material before it. This represents a reviewable error under s.58(1)(*c*) of the DESD Act.

[25] After misstating the length of the delay, the General Division concludes at par. 50 that, "[t]he Appellant has not provided any evidence of […] any mitigating circumstances for the delay." However, the General Division outlines the Appellant's submission at par. 34 to the effect that the Appellant was in in Iran at the time the reconsideration decision was issued, that he was forwarded the documents only outside the deadline and that, "…due to some limitations that he had, such as time and carrier company, he lost the due date." (Correspondence on file from the Appellant suggests some limitations in the English language. The General Division did not offer its own interpretation of the above statement but, given the context, it would be reasonable to assume that the Appellant meant to say that he had missed the due date, as opposed to meaning that he had forgotten the due date.

[26] In addition, the General Division acknowledged that the Respondent was aware on February 5, 2016, that the Appellant was then in Iran. A review of the file indicates that the Appellant called the Respondent on February 5, 2016. It its initial "comments" section, "status of reconsideration" is noted which is, presumably, a reference to the subject of the call. There is no indication that he offered or was asked for a forwarding address, although he provided phone numbers to reach him in Iran. A note on the file specifies that several unsuccessful attempts were made to reach him up to including the date of the note, March 22, 2016, but that no further attempts would be made (GD3-118). This is some evidence that could support a finding that he had not received his decision at that time and that he was making some effort to ensure that he did receive it.

[27] Irrespective of whether the General Division considered the evidence to be insufficient, the General Division erred in holding that there was no evidence. The finding that there was no reasonable explanation for the delay was therefore made without regard to the evidence and is a reviewable error under s.58(1)(*c*) of the DESD Act.

[28] Concerning the final *Gattellaro* factor, the General Division found that an extension of time would not prejudice either party, which would have been a clear finding of fact were it not for the proviso that immediately followed: "however, finality for the parties must come to an end."

[29] For that inscrutable proposition, the General Division cited two cases; *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249, and *Gattellaro* 2005 FC 883. At par. 16 of *Gattellaro,* Justice Snider said: "Given that there has been over seven years since the original decision and an even longer time since the Respondent made her initial application for CPP disability benefits, how is the Minister to ensure that an adequate response to the appeal is made? This could make the extension of time very prejudicial to the Minister." *Gattellaro* therefore links the need for finality to the question of prejudice, albeit in a context where the delay was inordinately long.

[30] If the General Division was implying that the delay was prejudicial after all, then it was contradicting itself. If, on the other hand, the General Division intended that some sort of distinct "finality" imperative acted to negate or offset the effect of its own finding that there was no prejudice, then this would be an improper or irrelevant consideration.

[31] In either case, the reasons do not permit the Tribunal to determine whether the test was applied correctly in this instance or how prejudice factored into the General Division's finding at par. 50, which states: "The Tribunal finds that the overriding consideration that the interests of justice has been served." [*sic*] The failure to provide adequate reasons may itself be considered a denial of natural justice. In *R.* v. *R.E.M.*, [2008] 3 SCR 3, 2008 SCC 51, the Supreme Court of Canada said that, "[…] [w]here reasons are legally required, their sufficiency must be assessed functionally. In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review."

[32] Since s.58 of the DESD Act sets out grounds of appeal virtually identical to the grounds on which judicial review might be undertaken, the Tribunal considers the decision in *R. v. R.E.M.* to be equally applicable here.

[33] In relation to the manner in which the prejudice factor was applied and in relation to whether the General Division properly considered, *as an overriding consideration*, that the interests of justice had been served, this Tribunal finds that the reasons are not sufficiently clear or detailed to permit the Tribunal to assess whether the General Division erred in its application

of the test as specified by *Larkman.* This represents a failure by the General Division to observe a principle of natural justice under s.58(1)(*a*).

CONCLUSION

[34] For the reasons set out above, the appeal is allowed.

REMEDY

[35] The application is remitted to the General Division for a new decision on the extension of time application.

Stephen Bergen
Member, Appeal Division