



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. R. v. Canada Employment Insurance Commission*, 2017 SSTADEI 363

Tribunal File Number: AD-17-549

BETWEEN:

T. R.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 19, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Employment Insurance (EI) Commission (Commission) issued a decision dated October 26, 2015, in which it re-examined the circumstances of the Applicant's claim and found that he had voluntarily left his employment at Peel Tile & Marble Inc. without just cause, that he was thereby disqualified from receiving benefits, and that he would be required to repay those benefits that he had received. A penalty was also imposed in respect of misrepresentations, and a notice of violation was issued.

[2] The Applicant filed an application for reconsideration to the Commission dated October 12, 2016. The Commission refused to consider his application because it was filed more than 30 days from the date on which the decision had been communicated to the Applicant.

[3] On June 22, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) found that the Commission had applied the wrong test in refusing the late application and had therefore not exercised its jurisdiction judicially. Because the General Division had no authority to refer the matter back to the Commission, the General Division applied the correct test from section 1(1) of the *Reconsideration Request Regulations*, and it substituted its own decision for that of the Commission. However, the application of the correct test by the General Division did not change the decision. The General Division still found that the Applicant had not provided a reasonable explanation for his delay in seeking a reconsideration, and the General Division therefore dismissed his appeal. The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal's Appeal Division on July 31, 2017.

ISSUE

[4] The Member must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), “An appeal to the Appeal Division may only be brought if leave to appeal is granted” and “The Appeal Division must either grant or refuse leave to appeal.”

[6] According to subsection 58(1) of the DESD Act, 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.

[7] Subsection 58(2) of the DESD Act states that, “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[8] Subsection 112 (1) of the *Employment Insurance Act* (Act) states that:

[a] claimant or other person, who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within

(a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Commission may allow.

[9] Subsection 1(1) of the *Reconsideration Request Regulations* states as follows:

For the purposes of paragraph 112(1)(b) of the *Employment Insurance Act* and subject to subsection (2), the Commission may allow a longer period to make a request for reconsideration of a decision if the Commission is satisfied that there is a reasonable explanation for

requesting a longer period and the person has demonstrated a continuing intention to request a reconsideration.

SUBMISSIONS

[10] The Applicant submits that the Commission made a mistake in its initial determination that he had quit his job. Had the Commission not made this mistake, he would not have had to seek a reconsideration (or been late in filing his reconsideration request). Furthermore, the Applicant claims that an amended Record of Employment was filed with the Commission in December 2016 that supports his position that he had not quit. He submits that the Commission should have taken this into account.

[11] The Applicant submits that the General Division failed to consider or to appreciate evidence of his medical condition at the time he had left his employment.

[12] The Applicant submits that the General Division failed to “obtain a greater explanation” for how his various circumstances or conditions affected his ability to deal with EI issues or to fully explain what would constitute a reasonable explanation for failing to seek a reconsideration in time.

[13] The Applicant also submits that the General Division applied the wrong test in requiring him to provide special reasons beyond a reasonable explanation.

[14] The Respondent did not provide submissions.

ANALYSIS

[15] Neither the original Commission decision—including the finding that the Applicant had voluntarily left his employment without just cause—nor the Commission’s failure/refusal to consider the amended Record of Employment was under appeal to the General Division. The General Division was clear in the hearing and in its decision that the only issue over which it had jurisdiction was the Commission’s determination that the Applicant had not provided a reasonable explanation for his delay in filing the application for reconsideration.

[16] As a result, this leave to appeal application is concerned only with whether the General Division made an error in determining that particular issue, i.e. that the Applicant had not provided a reasonable explanation for his delay in filing the application for reconsideration.

[17] The Applicant does not have to prove the case at the leave to appeal stage; leave to appeal will be granted if the Tribunal is satisfied that at least one of the above-mentioned grounds of appeal (from subsection 58(1) of the DESD Act) has a reasonable chance of success. The Federal Court in *Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12, stated that “[...] a ‘reasonable chance of success’ in this context means having some arguable ground upon which the proposed appeal might succeed.”

[18] This means that the Tribunal must, in accordance with subsection 58(1) of the DESD Act, be in a position to determine whether there is a question of law, fact or jurisdiction, the answer to which may lead to the setting aside of the decision under review.

[19] The Applicant has asserted all three grounds set out in subsection 58(1).

Erroneous finding of fact:

[20] The Applicant refers to the General Division’s finding of an “absence of medical confirmation that the condition existed and interfered with his normal functioning.” He states that the General Division did have medical evidence before it of his medical condition,

[21] The General Division’s jurisdiction was limited to the issue before it. It could only consider whether the Commission had exercised its discretion judiciously in denying the Applicant an extension of time, and, if not, whether the Applicant should be permitted to seek a reconsideration **out of time**.

[22] The only medical evidence that could be of relevance to the issue is evidence suggesting that a medical condition had, or could have, interfered with the Applicant’s ability to file a reconsideration request within 30 days of the date on which the Commission had communicated the decision to the Applicant as per paragraph 112(1)(a) of the Act.

[23] The General Division states at paragraph 24: “[The Applicant’s] reference to depression, *in the absence of medical confirmation that the condition existed* and interfered with

his normal functioning, including the ability to seek reconsideration, does not establish a reasonable explanation.” (my emphasis) This is a clear reference to the absence of medical evidence of depression, one condition that could plausibly be related to a delay in filing.

[24] Before the General Division, the Applicant provided a medical report from December 2013 that appears to indicate that he had fractured his hand. He submitted this report, “to support the fact that I indeed, was physically injured, and could no longer continue working.” (GD2-8) The Applicant did not relate this hand injury to his inability to file a timely request for reconsideration of a Commissions decision of October 26, 2015.

[25] I find that the Tribunal did not fail to consider or misapprehend the medical evidence. The medical evidence provided was not relevant to the issue before the General Division and the decision the General Division was required to make. I further find that the General Division did not base its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, and this ground presents no reasonable chance of success.

Principle of Natural Justice:

[26] The Applicant was concerned that the General Division had failed to “obtain a greater explanation” from him and that it had failed to fully explain what would constitute a reasonable explanation for failing to seek a reconsideration in time. He stated that this impacted his ability to explain his reasons. In effect, he is arguing that this interfered with the exercise of his natural justice right to be heard.

[27] I have reviewed the audio recording of the Applicant’s teleconference hearing before the General Division. In that hearing, the Applicant was questioned specifically and repeatedly as to why he had failed to request a reconsideration in a timely manner, afforded the opportunity to provide a fuller explanation for his prior statements, and offered open opportunities to add anything else he thought might be relevant to his explanation. He referred variously to his breakup with his girlfriend, the loss of his job, being busy, being out of work or seeking work, being confused as to the process and feeling down or depressed—all of which were consistent

with his request for reconsideration application form and with his prior statement to the Commission on November 1, 2016.

[28] It is important that the Applicant knows the case that he must meet. The Applicant must be aware of the evidence that the Commission has relied on, and he must understand that he needs to provide a reasonable explanation for why he failed to seek a reconsideration within the 30 days.

[29] However, it is abundantly clear from the Applicant's own submissions that he understood this much. It is not required or even appropriate that the Tribunal should, in the course of the hearing, advise the Applicant as to whether it considers his evidence to be sufficient, suggest what evidence the Applicant would need to modify or retract, or identify the nature or extent of additional evidence that the Applicant should provide.

[30] The Applicant has failed to identify any reviewable error in respect of any principle of natural justice, and I find that he has no reasonable chance of success on appeal.

Error of law

[31] I have read reviewed the General Division record including the decision, the evidence on the file, and the audio tape from the hearing.. The General Division did not apply any test other than the test required by subsection 1(1) of the *Reconsideration Request* Regulations, and explicitly rejected the notion that the test required him to establish a "special reason." The General Division simply rejected the Applicant's explanation as "unreasonable" within the meaning of the Regulations.

[32] It is unfortunate that the Applicant failed to request a reconsideration in a timely fashion, but the merits of the original Commission decision were not within the jurisdiction of the General Division and are also not within the scope of my review.

CONCLUSION

[33] The Applicant has failed to identify any ground on which he would have a reasonable chance of success on appeal. The Application is refused.

Stephen Bergen
Member, Appeal Division