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

Citation: *J. R. v. Canada Employment Insurance Commission*, 2017 SSTADEI 376

Tribunal File Number: AD-17-627

BETWEEN:

J. 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 31, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On August 3, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant did not have just cause for voluntarily leaving her employment under sections 29 and 30 of the *Employment Insurance Act*. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division, which was received on September 15, 2017. The Application was filed outside the 30-day limitation imposed by subsection 57(1) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUES

[2] The Member must decide whether to grant an extension of time to file the Application.

[3] If the extension of time is granted, the Member must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] Paragraph 57(1)(*a*) of the DESD Act provides that an application for leave to appeal must be made within 30 days after the day on which it is communicated to the appellant.

[5] Paragraph 19(1)(*a*) of the *Social Security Tribunal Regulations* (Regulations) states that the decision is deemed to have been communicated to a party 10 days after the day on which it was sent to the party, if sent by ordinary mail.

[6] Subsection 55(2) of the DESD Act permits the Appeal Division to allow further time within which an application for leave to appeal is to be made.

[7] According to subsections 56(1) and 58(3) of the DESD Act, an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[8] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

PRELIMARY ISSUE—Leave to appeal filed late

[9] The Applicant did not fully complete part five and did not complete part six of the Application, which provide an opportunity to explain when the application was received and why the application is late, so there is no evidence as to when the Applicant actually received the General Division decision.

[10] The decision of August 4, 2017, was mailed on August 4, 2017. Nothing in the file indicates that it was sent by any means other than regular mail.

[11] In the absence of evidence to the contrary, I have applied the deeming provision set out in subsection 19(1) of the Regulations. I find that the decision was communicated on August 14, 2017.

[12] The Application was filed on September 15, 2017. Counting 30 days from August 14, 2017, yields a filing deadline of September 13, 2017. I therefore find that the Application was filed two days late.

[13] Subsection 57(2) gives me the discretion to consider the Application, despite the fact that it was filed late.

[14] In order to determine whether I should exercise that discretion in favour of the Applicant and grant the Applicant an extension of time, I have considered the case law, including *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883; and *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249. These decisions accepted certain criteria as appropriate in determining whether to allow an extension of time.

[15] These criteria include the following:

a) The Appellant demonstrates a continuing intention to pursue the appeal;

b) The matter discloses an arguable case;

c) There is a reasonable explanation for the delay; and

d) There is no prejudice to the other party in allowing the extension.

[16] The weight to be given to each of the above factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served—*Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[17] In her testimony before the General Division, the Applicant stated that she does not read English and that she had no one to help her understand the documents sent to her in connection with her General Division appeal. She testified with the help of a Farsi interpreter.

[18] Given that the Application is only two days late, I am satisfied that there is little prejudice to the Respondent in permitting the late application and I am also satisfied that the Applicant had a continuing intention to appeal. Further, the Applicant's apparent need for an interpreter and for assistance in understanding the General Division decision is a reasonable explanation for such a short delay.

[19] The "arguable case" criterion is equivalent to the reasonable chance of success test for the granting of leave to appeal, so I will deal with this final element in the context of my leave to appeal decision.

SUBMISSIONS—Leave to Appeal

[20] The Applicant submits that she had been told she would be contacted when a Persian interpreter was located, but that she did not receive any further calls from the Tribunal, nor was there any attempt to schedule a hearing before she received a decision.

[21] She also submits that she would have sought to clarify a number of points and that she would have provided medical evidence, had the hearing taken place.

[22] The Respondent did not provide submissions.

ANALYSIS

[23] In her Application, the Applicant characterizes the ground of appeal as a factual error, but she did not identify any factual error. Rather, the essence of her submissions appears to be that the Applicant was denied her natural justice right to be heard per paragraph 58(1)(*a*) of the DESD Act.

[24] The Applicant submits that she received the scheduled call for the hearing but then was advised that an interpreter would be used, and that she would be contacted again when an interpreter was available. She claims that she was never called and that a hearing did not take place. The General Division rendered a decision without her having had a chance to be heard.

[25] I have reviewed the file, including the audio recording of a teleconference hearing that took place on July 26, 2017. The audio recording is of a General Division hearing related to the General Division decision that is the subject of this Application. The Applicant can be heard in the audio recording of the hearing and identifies herself by name. The hearing proceeded through to conclusion in the usual manner and did not appear to terminate prematurely so that interpretive assistance could be arranged, or for any other reason. A Farsi interpreter was also on the call, and she interpreted for the Applicant throughout the proceedings.

[26] The audio recording reveals that the General Division member asked the Applicant specific questions, and also provided her with the opportunity to ask her own questions and to add anything else she thought the member should hear. At no point over the course of the hearing did the Applicant present any medical evidence or make the claim that she had any medical evidence.

[27] Although the audio recording does not appear to support the Applicant's version of events, this does not mean that the Application must fail. The Federal Court of Appeal has given consideration to circumstances in which appellants fail to provide a clearly articulated ground for appeal. *Karadeolian v. Canada (Attorney General),* 2016 FC 615 is one such case. The Court noted that, "[…] the Tribunal must be wary of mechanistically applying the language of section 58 of the Act when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party like [the Appellant]."

[28] The audio recording supports the General Division member's statement at paragraph six of the decision, where she states, "The Tribunal asked the Appellant if she wished to proceed with the hearing even though she had not reviewed the documents and she indicated that she did wish to proceed."

[29] However, to be precise, the Applicant was asked if she felt comfortable proceeding when she had not read the documents, and she answered that she felt she could answer any questions and that she had "no other choice."

[30] The General Division did not correct the Applicant, but accepted this response without ensuring that the Applicant understood that there could be an alternative to continuing when the Applicant was unfamiliar with the evidence considered by the Commission or with the Respondent's arguments.

[31] The General Division also noted at paragraph six that it "[…] outlined that the documents included the Commission's submission and evidence." According to the recording of the proceedings, this is correct. However, the General Division member did not explain the difference between "submissions" and "evidence," how the General Division might use or rely on the documents on the claim file or how the General Division's reliance on those documents could potentially prejudice the Applicant if she did not refute the Respondent's submissions or answer the evidence.

[32] Furthermore, while the General Division asked the Applicant some questions, it did not review or refer to any part of the Commission's submissions or evidence in such a way as to assist the Applicant to respond in a meaningful way.

[33] If the Applicant's testimony at the hearing, to the effect that she had not had an opportunity to review the claim file, is accepted as credible, and if it is accepted that she proceeded with the hearing at that time on the understanding that she had no alternative, then this could well be a denial of the natural justice right to know the case. This would fall under the ground of appeal identified at paragraph 58(1)(*a*) of the DESD Act.

[34] I therefore find that the Applicant has a reasonable chance of success on appeal.

[35] Returning to my consideration of the extension of time, my finding of a reasonable chance of success is equivalent to a finding that there is an arguable case. Having regard to all of the criteria applicable to the consideration of a late appeal, I see no reason why I should not exercise my discretion to grant the required extension of time.

CONCLUSION

[36] An extension of time is allowed to permit consideration of the Application.

[37] The Application is granted.

[38] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen
Member, Appeal Division