



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. D. v. Canada Employment Insurance Commission*, 2017 SSTADEI 433

Tribunal File Number: AD-17-905

BETWEEN:

R. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Pierre Lafontaine

Date of Decision: December 12, 2017

REASONS AND DECISION

DECISION

[1] The Social Security Tribunal of Canada (Tribunal) refuses to grant an extension of time to file an application for leave to appeal.

INTRODUCTION

[2] On December 14, 2016, the Tribunal's General Division determined that the monies the Applicant received constituted earnings pursuant to section 35 of the *Employment Insurance Regulations* (Regulations) and that the monies were allocated correctly pursuant to section 36 of the Regulations.

[3] The Applicant requested leave to appeal to the Appeal Division on November 24, 2017, after receiving the General Division decision on December 15, 2016.

ISSUES

[4] The Tribunal must decide whether it will allow the late application, and if it does, it 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] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

ANALYSIS

[7] Subsection 58(1) of the DESD Act states that 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.

[8] In deciding whether to grant an extension of time to file an application for leave to appeal, the overriding consideration is whether the interest of justice favours granting the extension—*X (Re)*, 2014 FCA 249, *Grewal c. Minister of Employment and Immigration*, [1985] 2 F.C. 263 (F.C.A.).

[9] Relevant factors to consider are whether

- (a) there is an arguable case on appeal;
- (b) special circumstances justify the delay in filing the notice of appeal;
- (c) the delay is excessive; and
- (d) the respondent will be prejudiced if the extension is granted.

[10] Although the Respondent would not be prejudiced by the granting of an extension to file the application for leave to appeal, the Tribunal finds that the delay of eleven months is excessive. There are no special circumstances that prevented the filing of an application for leave to appeal within 30 days after the day on which the General Division decision was communicated to the Applicant or much sooner than November 24, 2017.

[11] Misinterpreting the outcome of the General Division decision rendered on December 14, 2016, does not constitute special circumstances.

[12] The Applicant was aware of the outcome of the General Division decision as early as February 11, 2017, when he received a notice of debt. Still, he delayed until November 24, 2017, to file his application.

[13] Furthermore, the Tribunal is not convinced that the Applicant has an arguable case or that the appeal has a reasonable chance of success.

[14] In his application for leave to appeal, the Applicant claims that the General Division erred in law in making its decision by including his income with the \$5,000.00 paid out to R. D. Ltd. That money went to the corporation as declared income and was used for truck payments.

[15] In characterizing settlement amounts as earnings or non-earnings, it is important to keep in mind the basic principles. One starts with subsection 35(2) of the Regulations, which provides that the earnings to be taken into account includes “the entire income of a claimant arising out of any employment.”

[16] Case law is abundant to the effect that if a claimant claims that the amounts received from their employer or former employer were paid out for reasons other than the loss of revenue arising from employment, a settlement or agreement based upon a lawsuit, or a complaint or claim because of a dismissal, it is up to the claimant to demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss—*Canada (Attorney General) v. Radigan*, 2001 CanLII 22152 (FCA); *Bourgeois v. Canada (Attorney General)*, 2004 FCA 117.

[17] The General Division concluded that there was no evidence to support that the \$5,000.00 paid to R. D. Ltd. was paid for something other than the Applicant’s loss of employment and, therefore, that the monies had to be allocated in accordance with subsection 36(9) of the Regulations as the payment was made by reason of a lay-off or separation from employment.

[18] According to the employer, the settlement of \$33,598.80 was the amount of severance that they paid out to the Applicant following a court hearing (the total was \$38,000.00 but because he had already received four weeks, he was then paid the balance). There is nothing in the General Division file that shows how the court came up with that amount (Exhibit GD3-118).

[19] Furthermore, the employer's Record of Employment indicates that the \$33,598.80 settlement was paid to the Applicant (GD3-109). The Applicant's wife stated in an interview with the Respondent that the \$5,000.00 was for money owed to the Applicant since he was leasing a truck to the employer when driving for them (Exhibit GD3-120).

[20] The evidence before the General Division does not demonstrate, by the preponderance of evidence, that due to "special circumstances," some portion of the settlement should be regarded as compensation for some other expense or loss.

[21] After considering all the above factors, the Tribunal is not convinced that the interest of justice favours granting the extension.

CONCLUSION

[22] The Tribunal refuses to grant an extension of time to file an application for leave to appeal.

Pierre Lafontaine
Member, Appeal Division