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

Citation: *J. M. v. Canada Employment Insurance Commission*, 2018 SST 44

Tribunal File Number: AD-17-391

BETWEEN:

**J. M.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: January 18, 2018

## REASONS AND DECISION

## INTRODUCTION

[1] On September 30, 2016, the Commission determined that the Applicant had voluntarily left her employment, which meant that she was not entitled to receive Employment Insurance (EI) benefits and that she needed to repay the amounts received. The Applicant made a late request for the Respondent to reconsider its decision. In a letter dated October 4, 2016, the Respondent refused to extend the time for the Applicant to request a reconsideration.

[2] The Applicant appealed the Respondent's refusal to the General Division of the Social Security Tribunal of Canada (Tribunal). In a decision dated April 3, 2017, the General Division held that the Applicant should not be allowed further time to make a request for reconsideration, and dismissed her appeal. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on May 10, 2017.

## ISSUE

[3] Does the Applicant's appeal have a reasonable chance of success?

## THE LAW

[4] 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 be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[5] 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.

[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] Subsection 1(1) of the *Reconsideration Request Regulations* stipulates that the Commission may allow further time if it 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

The Applicant submitted that the initial Commission decision had been sent to the wrong address but that she had called immediately after receiving it to try to resolve the issues over the phone. She indicated that her husband works with the Canadian Forces and that she has three children at home, all under the age of five, so she had attempted to resolve the issues with representatives over the phone, while she waited for him to return home. When he returned, she went into the office in person to bring in the reconsideration form.

## ANALYSIS

[8] The General Division accepted that the Commission had failed to exercise its discretion judicially in refusing to consider the late reconsideration request. Having reached this decision, the General Division proceeded to determine whether the late reconsideration should be accepted, having regard to the correct criteria.

[9] The General Division also accepted that the initial decision was not communicated until October 2015, and did not challenge any of the Applicant's evidence in relation to the actions she took after receiving the letter. The General Division concluded that the Applicant had demonstrated a continuing intention to seek a reconsideration. However, the General Division found that the Applicant's circumstances, as she related them, did not justify a delay of over nine months in seeking a reconsideration. In particular, the General Division found that it was unreasonable for the Applicant to attempt to resolve the matter with the Commission over the phone, without filing the formal request.

[10] In the Application, the Applicant has indicated her disagreement with the General Division decision but she has failed to articulate any error on the part of the General Division that could fall within the grounds of appeal identified in subsection 58(1) of the DESD Act.

[11] However, the Federal Court has determined that the Appeal Division should not mechanically apply subsection 58(1) in leave to appeal applications, but should review the record to determine possible errors. (See *Karadeolian v. Canada [Attorney General]*, 2016 FC 615; *Griffin v. Canada [Attorney General]*, 2016 FC 874; and *Joseph v. Canada [Attorney General]*, 2017 FC 391.) Therefore, I have reviewed the record before the General Division as well as the audio recording of the General Division hearing.

[12] The evidence before the General Division was that the Applicant had received the decision letter from the Commission in October 2015. The letter set out the timeline for seeking a reconsideration and directed the Applicant to contact the Commission for details on the process. The Applicant did contact the Commission the day she received the letter, and on several subsequent occasions. At some point, she was directed as to how to complete the reconsideration application form, but she did not file that form until August 2016. The Applicant testified that she understood the reconsideration application to be too important to trust to the mail and she described a number of personal circumstances that had made it difficult for her to file the form in person.

[13] The audio recording revealed that the Applicant had told the General Division that she thought she had initiated the "appeal" process the first day she called. The Applicant testified as follows:

> The day I got the letter—when I made the call—I truly believed that this was me starting my appeal process. Speaking with this representative for almost an hour in detail and stating my case, her taking notes, I thought, okay, this is her helping me with my appeal.

She agreed that she had made a mistake by not sending the form earlier, but she also said,

> I thought I was starting my appeal by, like I said, phone representative because they're taking everything you say […] and I feel like what's the difference if they're typing it out and I'm saying it in person, or if I'm writing it out and bringing it down. That's what I kept believing would start this process.

[14] I appreciate that subsection 78(2) of the *Employment Insurance Regulations* sets out a specific process for the filing of a request for reconsideration, which was not followed by the Applicant. Nonetheless, the Applicant's understanding of the process is of some significance in determining whether she has a reasonable explanation for the delay. An applicant who believes that they have already engaged the formal reconsideration process is on a different footing than an applicant who chooses to disregard the formal reconsideration process in favour of some unsanctioned resolution strategy of their own.

[15] At paragraph 33, the General Division focuses on the Applicant's reasons for not physically bringing the form to the Commission: that she was busy with her kids, that her military husband was away for eight months, that she did not have a car, and that she tried to resolve the issue on the phone.

[16] These reasons are specifically relevant to the Applicant's delay in filing the actual reconsideration form. However, if the Appellant's argument that she believed she had already begun the formal reconsideration process over the phone were accepted as a reasonable explanation for not meeting the technical requirements for filing a reconsideration, then the reasons for her delay in physically filing the form would be less important.

[17] The General Division's analysis addressed the two requirements of subsection 1(1) of the *Reconsideration Request Regulations*; that there be a reasonable explanation for requesting a longer period and that the person demonstrate a continuing intention to request a reconsideration.

[18] In addressing the first of these requirements (at paragraph 33), the General Division's analysis does not address the Applicant's explanation that she thought she had begun the process. The Applicant had testified as to her belief that she had already started her reconsideration and that she did not appreciate the fact that this could not be done without filing a written form, but the General Division does not refer to this evidence. The General Division analysis only engages the Appellant's reasons for failing to physically complete and file the application.

[19] After the General Division has moved on to consider the requirement that the Applicant have a continuing intention to request a reconsideration (in paragraph 34), it suggests that the Appellant acted unreasonably in trying to resolve the matter on the phone. However, the

General Division summarizes the Appellant's evidence on this point as follows: "… she sincerely thought she could deal with the issue on the phone *without filing a formal request for reconsideration*". It is not clear that the General Division understood the Appellant's testimony that she thought she had, in fact, commenced the formal reconsideration process over the phone.

[20] If the General Division did not determine the reasonableness of the Applicant's explanation that she sincerely believed she had already commenced the formal reconsideration process over the phone, then this may have been an error.

[21] On reading the decision and listening to the audio record of the hearing, I am left with some doubt that the General Division applied the test to a correct apprehension of all the Applicant's evidence. It is possible that the General Division's decision is based on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the evidence before it.

[22] Therefore, I find that there is a reasonable chance of success on appeal.

**CONCLUSION**

[23] The Application is granted.

[24] The Applicant is free to argue any, or additional grounds of appeal at her appeal hearing.

[25] 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