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

Citation: *D. W. v. Canada Employment Insurance Commission*, 2018 SST 779

Tribunal File Number: AD-18-357

BETWEEN:

D. W.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Stephen Bergen

Date of Decision: July 31, 2018

Canada

DECISION AND REASONS

DECISION

[1] An extension of time to apply for leave to appeal is denied. The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, D. W. (Claimant), applied for Employment Insurance benefits on April 9, 2017, and sought to have his application antedated to November 18, 2016, when he was first capable and available for work. The Respondent, the Canada Employment Insurance Commission (Commission), refused his request to antedate and maintained this decision when asked to reconsider. The Claimant appealed to the General Division of the Social Security Tribunal, but his appeal was dismissed. He now seeks leave to appeal to the Appeal Division.

[3] The extension of time application is denied, and I must therefore refuse the application for leave to appeal. The Claimant's application was filed late, and I am not satisfied that it would be in the interests of justice to allow the application to proceed.

PRELIMINARY MATTERS

Was the application for leave to appeal filed late?

[4] A leave to appeal application must be filed within 30 days of the date that the General Division decision is communicated to a party. However there is no information on file that would confirm the exact date the decision was received. In such cases, s. 19(1) of the *Social Security Tribunal Regulations* deems the decision to have been communicated 10 days from the date on which it is mailed. The decision is dated March 2, 2018, and was mailed with a letter dated March 5, 2018. Therefore, absent evidence to the contrary, the decision would be deemed to have been communicated on March 15, 2018.

[5] There is no evidence to suggest that it was received either earlier or later than March 15, 2018. Therefore, the Claimant's application for leave to appeal would have to be received by April 14, 2018.

[6] Although the original letter seeking leave to appeal is dated April 2, 2018, the postmark on the envelope indicates that it was mailed on June 1, 2018. The letter is date-stamped as received by the Tribunal on June 5, 2018. The application was incomplete when it was received. On June 12, 2018, the Tribunal informed the Claimant that if he completed the application by July 13, 2018, it would consider his application as having been received on June 5, 2018, the date the initial letter was received. The Claimant complied, and the Tribunal confirmed his application was complete on July 9, 2018.

[7] I find that the Claimant's application for leave to appeal was received on June 5, 2018, and that it is therefore 52 days late.

ISSUES

[8] Should the Appeal Division exercise its discretion to grant an extension of time for the Claimant to apply?

[9] If the extension of time is granted, does the Claimant have a reasonable chance of success on appeal?

ANALYSIS

Should the Claimant be granted an extension of time?

[10] Subsection 57(2) of the *Department of Employment and Social Development Act* (DESD Act) gives me the discretion to allow further time within which an application for leave to appeal may be filed.

[11] In order to determine whether I should exercise that discretion in favour of the Claimant and grant the Claimant an extension of time, I must have regard to the case law, including *Canada (Minister of Human Resources Development) v. Gattellaro* and *Muckenheim v. Canada (Employment Insurance Commission)*.[1] These decisions identified certain factors that should be considered in the exercise of discretion to allow or deny an extension of time.

[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883; *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249.

[12] The factors established by these decisions (the *Gattellaro* factors) are as follows:

- The applicant demonstrates a continuing intention to pursue the appeal;
- There is a reasonable explanation for the delay;
- There is no prejudice to the other party in allowing the extension; and
- The matter discloses an arguable case.

[13] The weight given to each of the above factors may differ in each case, and in some cases, different factors will be relevant. According to the Federal Court of Appeal in *Canada (Attorney General) v. Larkman*, the overriding consideration is that the interests of justice be served.[2]

[14] In the Tribunal's letter of July 9, 2018, it specifically requested that the Claimant explain the lateness of his application for leave. The Claimant responded in a letter dated July 16, 2018, which was received by the Tribunal on July 25, 2018.

[15] The Claimant stated that he had not received accurate or timely information on whether he had a right to Employment Insurance benefits (or that he had received incorrect or misleading information and that information was difficult to access), that he had received unnecessary correspondence since the time he was denied benefits, and that he had paid into the program for a long time.

[16] Unfortunately, the Claimant's response did not explain why his application for leave to appeal was filed late. There is therefore no evidence on which I might find that the Claimant had a continuing intention to pursue his appeal or that he had a reasonable explanation for the delay. I find that these two factors are not in favour of granting an extension of time.

[17] I have also considered the question of prejudice to the Respondent. I do not consider a 52-day delay to be so significant as to prejudice the Respondent's ability to prepare a response to the appeal or to unacceptably compromise any party's expectation of finality. This factor weighs in favour of granting an extension.

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[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[18] The final *Gattellaro* factor I must consider is whether the Claimant has an arguable case. An arguable case has been equated to a reasonable chance of success.[3]

[19] For the application for leave to appeal to succeed, I would have to find that there was a reasonable chance of success, or an "arguable case" that the General Division has made one of the types of errors described by the grounds of appeal in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) and set out below:

(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.

[20] Unless I could find an arguable case that the General Division erred in one of these ways, I would not be able to grant leave to appeal, even if I disagreed with the General Division's conclusion.

[21] The Claimant indicated on his application for leave form that the General Division failed to observe a principle of natural justice and that the General Division made an important error regarding the facts contained in the appeal file. However, the Claimant did not identify any principle of natural justice that was violated or explain how any particular finding of fact was perverse or capricious, or how a finding ignored or misunderstood the evidence.

[22] The Claimant argues that he is being treated unfairly because he is not a lawyer and that he does not understand the General Division decision, but he does not say in what way he is being treated unfairly or in what way the hearing and appeal process was deficient or responsible for his limited understanding. If he believes the reasons are inadequate, he has not explained how they are inadequate.

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[3] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Ingram v. Canada (Attorney General)*, 2017 FC 259.

[23] The Claimant also suggests that he should be entitled to benefits because he has paid into the system, but I may consider an appeal based only on the grounds of appeal described in s. 58(1) of the DESD Act, and such an argument does not relate to any of these grounds.

[24] The General Division found that the Claimant did not have good cause for the delay in applying for benefits in the period from November 18, 2017, to April 9, 2017. This finding was based largely on the Claimant's own testimony that he had assumed he was ineligible because he was over 65, that he had done nothing to verify that assumption until his wife saw something on the internet, and that there had been no physical impediment to prevent him from making an initial claim at an earlier date.

[25] The Claimant did not suggest that the General Division was wrong on this point or that there is other evidence that the General Division ignored, but I have nonetheless given some consideration to whether the General Division may have misunderstood or ignored evidence in its finding. I reviewed the record in accordance with the direction of such decisions as *Karadeolian v. Canada (Attorney General),*[4] but I did not discover an arguable case that there was any error in the manner in which the General Division considered the evidence.

[26] The Claimant does not have an arguable case that the General Division failed to observe a principle of natural justice under s. 58(1)(*a*) of the DESD Act, that it erred in law under s. 58(1)(b), or that it based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the material before it under s. 58(1)(c). Therefore, this factor does not support granting an extension of time, and I place substantial weight on this factor.

[27] Having considered all of the *Gattellaro* factors, I am not persuaded that the interests of justice would be served by allowing the extension of time. I have already found that the Claimant does not have an arguable case, which means that I could not grant the leave to appeal application in any event.

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[4] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

CONCLUSION

[28] The extension of time to apply for leave to appeal is denied.

[29] As a result, the application for leave to appeal is refused**.**

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	W. D., self-represented