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

Citation: *M. S. v. Canada Employment Insurance Commission*, 2018 SST 871

Tribunal File Number: AD-18-524

BETWEEN:

M. S.

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: September 7, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. S. (Claimant), accepted employment during a period in which he was collecting Employment Insurance benefits. On learning of this fact, the Respondent, the Canada Employment Insurance Commission (Commission), calculated an overpayment relating to undeclared earnings and payments received during the period in which he was considered to be disentitled. A penalty was assessed, and a notice of violation was issued. Following the Claimant's request for reconsideration, the penalty was reduced, but the decision was otherwise maintained. The Claimant appealed to the General Division of the Social Security Tribunal, which accepted the Commission's concession that the notice of violation should be withdrawn and its recommendation that the penalty should be reduced further. The Claimant further appealed to the Appeal Division.

[3] The Claimant's application for leave to appeal was received late. The Tribunal refuses the extension of time because it would not be in the interests of justice to allow the application for leave to appeal to proceed. The Claimant did not provide a sufficient and reasonable explanation for why his application was late, and, more importantly, the Claimant has not made out an arguable case.

PRELIMINARY MATTERS

Was the application for leave to appeal filed late?

[4] According to s. 57(1) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made in the prescribed form and must be made within 30 days after the day on which the General Division decision is communicated to a party.

[5] There is no information on file that would confirm the exact date that the decision was actually communicated to the Claimant. 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 May 25, 2018, and was sent by ordinary mail with a letter dated May 28, 2018. Therefore, the Claimant is deemed to have received the decision on June 7, 2018.

[6] The Claimant's application for leave to appeal was not received by the Appeal Division until August 15, 2018, which is 69 days from the date that the decision is deemed to have been communicated. This is outside the 30-day deadline. Therefore, the application for leave to appeal is late.

ISSUE

[7] Should the Appeal Division exercise its discretion to grant an extension of time to file the leave to appeal application?

ANALYSIS

[8] Subsection 57(2) of the DESD Act grants the Appeal Division the discretion to allow further time within which an application for leave to appeal may be made. While it is within the Appeal Division's discretion, the Federal Court of Appeal has required that the Appeal Division consider certain factors in the exercise of that discretion.[1] These factors (referred to as 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.

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

[9] 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*,[2] the overriding consideration is that the interests of justice be served.

Should the Claimant be granted an extension of time?

[10] In response to a question in the application for leave asking him to explain why his appeal was late and to address each of the above *Gattellaro* factors, the Claimant responded that he was "trying to work and looking after sick spouse."

[11] The first *Gattellaro* factor concerns whether the Claimant has demonstrated a continuing intention to appeal. The application was received about five weeks after the deadline, which is a substantial delay. The Claimant did not contact the Tribunal within that period to indicate his intention to pursue the appeal. Although this factor weighs against granting the extension, the length of time is not great enough for me to be able to place much weight on the Claimant's failure to contact the Tribunal.

[12] The second factor relates to whether the Claimant has a reasonable explanation for the delay. The Claimant says only that he was trying to work and was looking after his sick spouse. This suggests that he was both busy and perhaps emotionally preoccupied. The Claimant testified to the General Division on May 9, 2018, that his wife had had heart surgery to implant a stent, which suggests that his wife has a serious condition.

[13] The Claimant provided no details about the nature of his job or his involvement in his wife's care, and he did not otherwise explain why it took him as long as it did to complete a form and send it to the Tribunal. He indicated in his application, which was received by the Tribunal on August 15, 2018, that his wife had another operation scheduled for August 15, 2018. This implies that he was able to complete and forward the application just days prior to the scheduled operation. If he could think to complete and send it in at that point, he should have been able to submit his application earlier. I do not find that the Claimant has given a reasonable explanation for the delay. This factor does not weigh in his favour.

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

[14] The third factor concerns the prejudice to the Commission of the Claimant's delay. I do not consider a 39-day delay to be so significant as to prejudice the Commission's ability to prepare a response to the appeal or that it unacceptably compromises any party's expectation of finality. This factor supports granting the requested extension.

[15] 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] This is the same decision that I would have to make on the leave to appeal application, if I were to grant the extension. 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," based on the fact that the General Division made one of the types of errors described by the grounds of appeal in s. 58(1) of the 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.

[16] 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 disagree with the General Division's conclusion.

[17] The Claimant indicated on his application for leave form that the General Division erred in law. His essential argument is that the overpayment should have been cancelled because he couldn't afford it.

[18] The only issues arising from the reconsideration decision before the General Division were the Claimant's disentitlement as a result of being employed, the penalty under s. 38 of the

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

Employment Insurance Act (EI Act), and the Notice of Violation under s. 7.1 of the EI Act. The Claimant's overpayment arose as a result of undeclared earnings under s. 19(3) of the EI Act and his disentitlement, which he did not dispute. He agreed with information provided by his employer that confirmed his earnings during a period in which he was also receiving benefits.

[19] The Claimant did not identify any error of law or dispute the General Division's findings related to the penalty and the notice of violation. There is no arguable case that the General Division erred in law in relation to the Commission's requirement that the Claimant repay the overpayment. This issue was not before the General Division.

[20] Even if the overpayment had been challenged before the General Division, the General Division would not have been permitted to ignore or to override the provisions of the EI Act. Paragraph 43(*b*) of the EI Act states that a claimant is liable to repay an amount paid by the Commission to the claimant as benefits for any period to which the claimant is not entitled. Subsection 47(1) says all such amounts are debts due to the Crown and are recoverable in court. The General Division could not have ignored the clear direction of the EI Act.

[21] Although the Commission argued before the General Division that the Claimant's situation does not meet the conditions of s. 56 of the *Employment Insurance Regulations* such that the debt could be written off, I have not discovered where the Commission made any initial decision refusing the Claimant's request to write off the debt. It may still be open to the Claimant to request the Commission to write off the debt, but this was not an issue in the present appeal.

[22] The Federal Court of Appeal has indicated that it may be necessary to review the record to determine whether evidence has been ignored or misunderstood.[4] The Claimant has not disputed the issues on which the General Division ruled, but I have reviewed the record nonetheless. I have not discovered an arguable case relating to any factual error.

[23] The Claimant has not raised an arguable case. I must give this factor significant weight in considering whether to grant the extension of time to bring the application for leave to appeal.

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

[24] Having considered all these factors, I do not consider that the interests of justice will be served by granting the extension.

CONCLUSION

[25] An extension of time to apply for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	M. S., self-represented