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

Citation: *D. H. v. Canada Employment Insurance Commission*, 2018 SST 1102

Tribunal File Number: AD-18-717

BETWEEN:

D. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: November 7, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, D. H. (Claimant), applied for Employment Insurance regular benefits. On December 12, 2017, the Respondent, the Canada Employment Insurance Commission (Commission), refused her application for benefits because it found that she had voluntarily left her employment without just cause and that voluntarily leaving her employment was not her only reasonable alternative. The Claimant disputed that she had voluntarily left her employment, claiming that her position had been eliminated and that she was forced to retire. She requested a reconsideration of the Commission's decision, but she was late in doing so. In her request, she explained that she was late in requesting the reconsideration because it was only after she received the results of a complaint to the Labour Board that she learned that the employer had informed the Commission that she had retired, rather than forced into retirement.

[3] On July 9, 2018, the Commission determined that the Claimant's explanation for the delay did not meet the requirements of the *Reconsideration Request Regulations* (Regulations), and, as a result, the Commission declined to reconsider its decision.[1] The Claimant immediately appealed the Commission's decision of July 9, 2018 to the General Division.[2] The General Division dismissed the appeal because it found that the Claimant had "no intention to appeal throughout the time of her delay in doing so"[3] and that the Commission had exercised its discretion in accordance with the Regulations.

[4] The Claimant now seeks leave to appeal the General Division's decision on the ground that the General Division failed to observe a principle of natural justice. I must now decide whether the appeal has a reasonable chance of success.

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[1] Commission's letter dated July 9, 2018.
[2] Notice of Appeal - Employment Insurance Form, at GD2.
[3] General Division decision at para 1.

ISSUE

[5] Is there an arguable case that the General Division failed to observe a principle of natural justice?

ANALYSIS

[6] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under section 58(1) of the DESDA and that the appeal has a reasonable chance of success. This is a relatively low bar. Claimants do not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v Canada (Attorney General)*.[4]

Is there an arguable case that the General Division failed to observe a principle of natural justice?

[8] No. I am not satisfied that there is an arguable case that the General Division failed to observe a principle of natural justice.

[9] Natural justice is concerned with ensuring that claimants have a fair opportunity to present their case and that the proceedings are fair and free of any bias. Natural justice relates to issues of procedural fairness before the General Division, rather than the impact of a decision on

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[4] *Joseph v Canada (Attorney General)*, 2017 FC 391.

a claimant, however unfair the decision may seem. The Claimant's allegations do not address any issues of procedural fairness or of natural justice as they relate to the General Division. The Claimant has not pointed to or provided any evidence—nor do I see any evidence—to suggest that the General Division might have deprived her of an opportunity to fully and fairly present her case or that it exhibited any bias against her. As a result, I am not satisfied that the appeal has a reasonable chance of success on this ground.

[10] I have reviewed the underlying record. I do not see that the General Division erred in law, whether or not the error appears on the record, or that it failed to properly account for any of the key evidence before it.

[11] The General Division properly identified the legal test before it when it decided the issue of whether the Commission had appropriately declined to extend the time to make a request for reconsideration of a decision. The General Division cited the Regulations and noted that they stipulate that the Commission may allow a longer time period than the 30-day time limit (under section 112 of the *Employment Insurance Act*) where an applicant can demonstrate a reasonable explanation for requesting the extension and can show that they had a continuing intention to request such an extension throughout the delay period. The General Division also noted that the jurisprudence has established that the Commission's decisions are discretionary and that they should not be disturbed unless it can be shown that it failed to exercise the discretion in a judicial manner: that is, that it acted in good faith, having regard to all the relevant factors and having ignored any irrelevant factors. In assessing and weighing the evidence before it, the General Division applied the relevant provisions and the case law.

[12] The test whereby the Commission may allow a longer period to make a reconsideration request under section 1(1) of the Regulations is two-part: an applicant must demonstrate a reasonable explanation and must show that a continuing intention existed throughout the delay period. The General Division accepted the Claimant's reason for not requesting a reconsideration within the 30 days after the Commission's decision had been communicated to her, but it did not make any explicit findings as to whether it considered her explanation reasonable. The General Division addressed only the second part of the test: whether the Claimant had a continuing intention to seek a reconsideration throughout the six-month delay. However, addressing only

one component of the test does not constitute a legal error because the test is conjunctive. This means that the Claimant had to meet both criteria and if she failed to meet one, it was unnecessary to consider whether she met the second requirement.

[13] Arguably, the General Division overlooked two key pieces of evidence, but they would have been of no assistance to the Claimant. The Commission's notes show that the Claimant was unable to account for the delay in requesting a reconsideration, other than that she relied on her representative.[5] The General Division alluded to the Claimant's reliance on her representative, but made no mention that she was otherwise unable to account for the delay. This omission, however, would not have changed the outcome of the proceedings.

[14] The other key piece of evidence that the General Division overlooked was the Claimant's allegations that the Commission had advised her to pursue her claim with the Ministry of Labour regarding the characterization of the circumstances of her departure from the company.[6] She apparently had been left with the impression that she should pursue her claim with the Ministry of Labour. However, this took her outside the Employment Insurance process. The Claimant suggests that the Commission provided her with erroneous advice and that it led her astray, which then resulted in the delay. Even if the General Division had considered and accepted this evidence, it would not have helped the Claimant either because there are no measures available under the *Employment Insurance Act* to assist a claimant who receives erroneous advice or misinformation from the Commission.

[15] The Claimant's situation is somewhat analogous to the circumstances in *Pattamestrige v Canada (Attorney General)*.[7] Mr. Perera, the applicant in that case, alleged that he received erroneous advice from an employee of the Social Security Tribunal suggesting that he should send his submissions to the Commission, when in fact he should have sent them to the Tribunal. The Federal Court found that Mr. Perera failed to provide any affidavit or other evidence to substantiate his allegation. The Federal Court also noted that the letter that Mr. Perera received from the Tribunal was very clear that his submissions were to be sent to the Tribunal. In this

[5] Supplementary Record of Claim, at GD3-23 and GD3-24.
[6] At approximately 2:48, 5:40, and 5:50 of audio recording of General Division hearing on October 3, 2018.
[7] *Pattamestrige v Canada (Attorney General)*, 2016 FC 114.

case, the Commission's letter was also very clear that the Claimant had 30 days to make a formal request for reconsideration to the Commission.

[16] The Claimant maintains that she requested a reconsideration without delay. If the Claimant is asking that I reassess this matter, I am unable to do so under section 58(1) of the DESDA, because it provides for limited grounds of appeal. The subsection does not provide for any reassessments as a ground of appeal.

CONCLUSION

[17] Given the above considerations, I am not satisfied that the appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

APPEARANCES:	D. H., Applicant Brian Johnson, for the Applicant