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

Citation: *T. L. v Canada Employment Insurance Commission*, 2018 SST 1248

Tribunal File Number: AD-18-513

BETWEEN:

T. L.

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: November 28, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, T. L. (Claimant), voluntarily left his employment because of changes to his work hours and his employer's expectations. He believed these changes were affecting his health. He applied for and received Employment Insurance benefits. After investigating the circumstances of the Claimant's leaving, the Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant had voluntarily left his employment without just cause, and it imposed a retroactive disqualification. The Commission also declared an overpayment and imposed a penalty.

[3] The Claimant requested a reconsideration, and the Commission changed the penalty to a warning letter, but it maintained the disqualification and overpayment decision. The Claimant appealed to the General Division, but his appeal was dismissed. He now seeks leave to appeal to the Appeal Division and an extension of time in which to request the leave to appeal.

[4] The extension of time to apply for leave to appeal is refused. The Claimant did not demonstrate a continuing intention to appeal, has not given a reasonable explanation for the delay, and has not made out an arguable case that would be successful on appeal. Therefore, it is not in the interests of justice to allow the late appeal.

ISSUES

[5] Was the application for leave to appeal filed late?

[6] If the appeal was late, should the Appeal Division exercise its discretion to grant an extension of time to file the leave to appeal application?

ANALYSIS

Issue 1: Was the application for leave to appeal filed late?

[7] According to section 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.

[8] There is no information on file that would confirm the exact date that the decision was actually communicated to the Claimant. In such cases, section 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 13, 2018, and was sent by ordinary mail with a letter dated March 14, 2018. Therefore, the Claimant is deemed to have received the decision on March 24, 2018.

[9] The Appeal Division did not receive the Claimant's application for leave to appeal until August 13, 2018. The Claimant's original application was not complete, but the Tribunal wrote the Claimant on August 17, 2018, to explain that the Tribunal would consider his application to have been filed on August 13, 2018—when the first incomplete application was received—if the Claimant submitted the missing information before September 17, 2018. The Tribunal received the information it requested on August 31, 2018, which was before the deadline, so it considered the application to have been filed on August 13, 2018.

[10] However, August 13, 2018, is still 142 days from the date that the decision is deemed to have been communicated to the Claimant and well outside the 30-day deadline. Therefore, the application for leave to appeal was filed late.

Issue 2: Should the Appeal Division exercise its discretion to grant an extension of time to file the leave to appeal application?

[11] Section 57(2) of the DESD Act grants the Appeal Division the discretion to allow further time for a party to make an application for leave to appeal. While this determination is within the Appeal Division's discretion, the Federal Court of Appeal has required the Appeal Division to

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.

[12] 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.

[13] In his original application for leave to appeal, the Claimant did not explain why it had been submitted late. In response to the Tribunal's request that he provide the missing information required to complete his application, he submitted a revised application that referred only to the fact that his original application for leave had to be amended or supplemented.

[14] The Tribunal directed a separate letter to him on October 15, 2018, requesting that he explain why his appeal was late and suggesting that he address each of the above *Gattellaro* factors. The Claimant submitted an explanation for the delay in completing his application **after August 13, 2018**, but he did not address the nearly five-month delay between the date the decision was deemed to have been communicated to him and the date he filed his initial incomplete application.

[15] I am not satisfied that the Claimant demonstrated a continuing intention to pursue his appeal or that there was a reasonable explanation for the delay of almost five months. These factors weigh against allowing an extension of time to apply for leave to appeal.

[16] The delay was significant enough that it could potentially have prejudiced the Commission's ability to respond to the appeal, but the Commission has not suggested that it suffered any prejudice in fact, so I give this factor little weight.

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[1] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883; *Muckenheim v Canada (Employment Insurance Commission)*, 2008 FCA 249.
[2] *Canada (Attorney General) v Larkman*, 2012 FCA 204.

[17] The final *Gattellaro* factor is whether the matter discloses an arguable case. A reasonable chance of success has been equated to an arguable case.[3] Unless I can find that there is an arguable case on one of the grounds of appeal, the appeal would have no reasonable chance of success, even if I were to grant the extension of time and allow the application for leave to appeal to proceed.

[18] The only grounds of appeal are as follows:

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.

[19] One of the grounds of appeal that the Claimant selected in his application is that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, which would be considered an error under section 58(1)(a) of the DESD Act. He also selected that the General Division made an important error regarding the facts, which relates to the third ground of appeal under section 58(1)(c) of the DESD Act.

[20] He expands on the nature of these errors by saying that the General Division based its decision on a "technical point" that his leaving his employment was not on the advice of his doctor and the fact he had not been able to produce a doctor's note confirming his doctor's advice to leave his job. He asserts that the General Division erred by equating the doctor's advice to a written note and that he should not be forced to work when it affects his health. He also states that, "The record does not contain my working part-time hours does not mean that I did not work in those hours of the day."

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

Natural justice

[21] Natural justice refers to fairness of process and includes procedural protections such as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against him or her. Section 58(1)(a) of the DESD Act permits me to consider the fairness of the process at the General Division only. The Claimant has not raised a concern with fairness at the General Division.

[22] The Clamant may disagree with the conclusions or the result of the General Division hearing, and he may consider that result to be unfair, but this would not be considered an error of natural justice.

Error of fact or law

[23] The Claimant has not pointed to any error of law. It appears that the General Division applied the correct legal test to determine that the Claimant did not have just cause for leaving his employment because he had reasonable alternatives to leaving, having regard to all the circumstances, as set out in section 29(c) of the *Employment Insurance Act* (EI Act). The General Division also referred to *Canada (Attorney General) v Laughland*,[4] where the Federal Court of Appeal held that the question to consider is not whether it was reasonable for the applicant to leave his employment, but rather, whether "leaving the employment was the only reasonable course of action open to him, having regard to all the circumstances."

[24] I acknowledge that "working conditions that constitute a danger to health or safety" is a relevant circumstance under section 29(c)(iv) of the EI Act that the General Division was required to consider when it determined whether the Claimant had reasonable alternatives to leaving. However, it is plain that the General Division did consider the Claimant's evidence about his health problems.[5] The General Division accepted that the Claimant had diabetes and hepatitis and that his medical conditions may have required him to take breaks. On review of the evidence, the General Division was not satisfied that the Claimant's doctor had recommended that the Claimant quit or that the Claimant had discussed with his employer how his health

[4] *Canada (Attorney General) v Laughland*, 2003 FCA 129.
[5] General Division decision, paras 38–41.

problems might be accommodated. Therefore, the General Division determined that the Claimant had not exhausted his reasonable alternatives before quitting.

[25] So far as the Claimant's assertion that the General Division made factual errors, I note that the Claimant appears to suggest that the General Division placed too much weight on the absence of a doctor's note recommending that he quit his job. However, as noted in *Tracey v Canada (Attorney General,* it is not the role of the Appeal division to interfere with the manner in which the General Division evaluated or reweighed the evidence in order to reach a different conclusion.[6]

[26] This same principle also applies to the evidence of the Claimant's hours of employment. As the trier of fact, it was open to the General Division to accept the evidence of the Record of Employment (ROE), and I am not permitted to substitute my view of the evidence for that of the General Division. The General Division stated that the Claimant could not explain why the ROE did not indicate any notable change in the Claimant's hours over the course of his employment.[7] It therefore did not accept that the Claimant's hours had been reduced from full-time to part-time.

[27] In my view, the Claimant has not raised an arguable case that the General Division erred under any of the grounds of appeal. This suggests that the appeal would not have a reasonable chance of success, even if leave to appeal were granted. This factor weighs against allowing the extension of time.

[28] Having regard to all four *Gattellaro* factors, I find that it is not in the interests of justice to allow the appeal to proceed. The Claimant has not demonstrated a continuing intention to pursue his appeal, given a reasonable explanation for the delay, or raised an arguable case on the merits of his appeal.

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[6] *Tracey v Canada (Attorney General)*, 2015 FC 1300.
[7] General Division decision, para 35.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	T. L., self-represented