



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *H. R. v Canada Employment Insurance Commission*, 2018 SST 1255

Tribunal File Number: AD-18-649

BETWEEN:

**H. R.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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Decision on Request for Extension of Time by: Stephen Bergen

Date of Decision: November 30, 2018

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] The Respondent, the Canada Employment Insurance Commission (Commission), discovered that the Applicant, H. R. (Claimant), was paid sickness benefits for two weeks in which she was also paid a full salary. Because these earnings had not been deducted from her benefits earlier, the Commission declared an overpayment. The Claimant sought a reconsideration, but the Commission maintained its original decision. The Claimant's appeal to the General Division was also dismissed. The Claimant now seeks leave to appeal and an extension of time in which to request leave to appeal.

[3] An 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

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

[5] 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?**

[6] 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.

[7] 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 July 16, 2018, and was sent by ordinary mail with a letter of the same date. Therefore, the Claimant is deemed to have received the decision on July 26, 2018.

[8] The Claimant called the Tribunal on September 26, 2018, to indicate she would be appealing the General Division decision, however the Appeal Division did not receive the Claimant's application for leave to appeal until October 5, 2018. This is 71 days from the date that the decision is deemed to have been communicated to the Claimant and well outside the 30-day deadline.

[9] 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?**

[10] 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.<sup>1</sup> 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.

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

[11] 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*,<sup>2</sup> the overriding consideration is that the interests of justice be served.

[12] In her application for leave to appeal, the Claimant said only that she had had a busy summer with a few family members in the hospital and that it had taken her some time to sort everything out and contact the Tribunal.

[13] The Tribunal wrote to the Claimant on October 16, 2018, requesting that she explain why her appeal was late and asking for the basis for her appeal. The letter suggested that she address each of the above *Gattellaro* factors in as much detail as possible. No response was received.

[14] Although the Claimant called the Tribunal on September 26, 2018, she was already 64 days late at that point, and she waited another 5 days before submitting her leave to appeal application. I am not satisfied that the Claimant demonstrated a continuing intention to pursue her appeal. I am also not satisfied with the level of detail in the Claimant's explanation. The fact that the Claimant had a busy summer or some family in the hospital does not suggest to me circumstances that were so urgent or overwhelming that she was unable to file her application for leave in a timely manner. She delayed almost 2½ months beyond the 30 days that are allowed to file an appeal. These factors—namely the continuing intention to appeal and a reasonable explanation for the delay—weigh against allowing an extension of time to apply for leave to appeal.

[15] Although 2½ months is a lengthy delay, the Commission has not suggested that it suffered any prejudice to its ability to respond to the appeal. I consider this factor to be neutral overall.

[16] The final *Gattellaro* factor is whether the matter discloses an arguable case. A reasonable chance of success has been equated to an arguable case.<sup>3</sup> 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

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<sup>2</sup> *Canada (Attorney General) v Larkman*, 2012 FCA 204.

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

success, even if I were to grant the extension of time and allow the application for leave to appeal to proceed.

[17] The Claimant failed to select or explain the grounds for her appeal in her application for leave. Despite the Tribunal's request that she clarify her grounds of appeal, she has not done so.

[18] Nonetheless, I have followed the direction of the Federal Court in cases such as *Karadeolian v Canada (Attorney General)*,<sup>4</sup> and I have reviewed the record for evidence that the General Division may have been overlooked or misunderstood when reaching its decision. I am unable to discover an arguable case in relation to such an error.

[19] In my view, the Claimant has not raised an arguable case that the General Division erred under any of the grounds of appeal set out in section 58(1) of the DESD Act. 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.

[20] 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 her appeal, given a reasonable explanation for the delay, or raised an arguable case on the merits of her appeal.

## CONCLUSION

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

Stephen Bergen  
Member, Appeal Division

REPRESENTATIVE:	H. R., self-represented
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<sup>4</sup> *Karadeolian v Canada (Attorney General)*, 2016 FC 615.