



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. T. v Canada Employment Insurance Commission*, 2018 SST 1294

Tribunal File Number: AD-18-725

BETWEEN:

**A. T.**

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: December 17, 2018

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] After the Applicant, A. T. (Claimant), was dismissed from his employment, he received \$16,422.00 in severance pay. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the entire amount was earnings and allocated it to the Claimant's normal weekly earnings accordingly. The Claimant disputed this, arguing that the payment was not severance but rather compensation for a work-related disability. He asked the Commission to reconsider, but the Commission maintained its decision. The Claimant appealed to the General Division of the Social Security Tribunal. His appeal was dismissed and he now seeks leave to appeal to the Appeal Division.

[3] The Claimant's application for leave to appeal was received late. I have refused 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.

### PRELIMINARY MATTERS

#### **Was the application for leave to appeal filed late?**

[4] 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.

[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, 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 June 20, 2018, and was sent by ordinary mail with a

letter dated June 25, 2018. Therefore, the Claimant is deemed to have received the decision on July 5, 2018.

[6] The Appeal Division did not receive the Claimant's application for leave to appeal until October 29, 2018, which is 86 days from the date that the decision is deemed to have been communicated to him. Although the application was incomplete when the Tribunal received it initially, the Claimant met all the application requirements of the Tribunal on November 29, 2018. The Tribunal accepted his application as though it had been filed on the earlier date of October 29, 2018.

[7] However, October 29, 2018, is well outside the 30-day deadline, calculated from the date the decision was deemed to have been communicated. Therefore, the application for leave to appeal is late.

## **ISSUES**

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

[9] If I grant an extension of time, is there an arguable case that the General Division erred in law, such that leave to appeal should be granted?

## **ANALYSIS**

[10] Section 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 this decision 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.<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

---

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

- The matter discloses an arguable case.

[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.

**Issue 1: Should the Appeal Division exercise its discretion to grant an extension of time to file the leave to appeal application?**

[12] In response to a question on the application for leave form asking him to explain why his appeal was late and to address each of the above *Gattellaro* factors, the Claimant responded that he didn't know what to do. He said he called friends, lawyers, Service Canada, and Revenue Canada and that he was trying to find out who would help him.<sup>3</sup>

[13] The first *Gattellaro* factor to be considered is whether the Claimant has demonstrated a continuing intention to appeal. The Claimant demonstrated a continuing intention to appeal at the time that he contacted the Tribunal on July 12, 2018, to ask whether he could appeal his General Division decision. At that time, he still had more than two weeks to file his application for leave to appeal within the 30-day deadline. However, the Tribunal did not receive his application for leave to appeal until three and a half months later. There was no contact with the Tribunal between his initial contact and the submission of his application.

[14] Although the Claimant has stated that he tried contacting various agencies and individuals to seek help applying for leave, he does not say when or how often he attempted contact or whether he followed up on any advice he received. He had already obtained advice once from the Tribunal in connection with his leave application, and he could have called again, if he was still unclear. I therefore find that he did not demonstrate a continuing intention to appeal. This factor weighs against granting the extension.

[15] The second *Gattellaro* factor is whether the Claimant has a reasonable explanation for the delay. The Claimant says that he did not know what to do, but he had already called the Tribunal on July 20, 2018, to ask whether he could appeal, and the Tribunal informed him how to apply

---

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

<sup>3</sup> AD1-4.

and warned him that he needed to file his application within 30 days of the communication of the decision. He was guided to the website and the application form. The fact that he apparently received little help from the others that he consulted is irrelevant because he had already been given appropriate advice on applying for leave. If he found that he needed additional assistance, he knew where he could get it. The Claimant has not provided a reasonable explanation for the delay. This factor also weighs against granting an extension.

[16] The third factor concerns the prejudice to the Commission of the Claimant's delay. The delay is substantial enough that it is possible there may have been some prejudice to the Commission's ability to prepare a response to the appeal. However, the Commission has not opposed the Claimant's request for an extension or provided submissions in which it argues actual prejudice. I consider this factor to be neutral, and I will not be relying on it.

[17] The final *Gattellaro* factor is whether the Claimant has an arguable case. An arguable case has been equated to a reasonable chance of success.<sup>4</sup> 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 section 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.

[18] 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.

---

<sup>4</sup> *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.

[19] The Claimant indicated on his application for leave form that the General Division erred in law. He did not elaborate as to the manner in which the General Division erred in law.

[20] The General Division considered a severance payment to be earnings under section 35 of the *Employment Insurance Regulations* (Regulations) and allocated the payment in accordance with section 36(9) of the Regulations. The Claimant has not explained why he believes the General Division erred in law, and no error or law is apparent on the face of the decision. Therefore, the Claimant has not made out an arguable case. This factor weighs against granting the extension of time.

[21] I considered whether I should ask the Claimant to expand on the error he believes the General Division made before making my decision. However, I would not be persuaded to grant an extension even if the Claimant could bring forward an arguable case. The Tribunal had specifically informed the Claimant how to pursue his application for leave at a time when he could still have filed without requiring an extension. As a result, the Claimant was aware of the process to file an application for leave early on, or at the very least, he was aware of where to go for help, and yet he did nothing. I reject his explanation for the delay entirely and find that his failure to exercise his appeal rights in a timely manner was either willful or reckless. Even if the Claimant could satisfy me that he had an arguable case on the merits of the appeal, this would not change my decision to deny an extension of time—in these circumstances.

[22] In my view, it would not be in the interests of justice to allow the extension of time.

**Issue 2: Is there an arguable case that the General Division erred in law such that leave to appeal should be granted?**

[23] I have already found that there is no arguable case for the purpose of assessing whether to grant an extension of time, and I have refused the extension of time. Therefore, there is no need to consider this further.

**CONCLUSION**

[24] An extension of time to apply for leave to appeal is denied.

Stephen Bergen  
Member, Appeal Division

REPRESENTATIVE:	A. T., self-represented
-----------------	-------------------------