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

Citation: *H. H. v Canada Employment Insurance Commission*, 2018 SST 1303

Tribunal File Number: AD-18-841

BETWEEN:

H. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Janet Lew

Date of Decision: December 27, 2018

DECISION AND REASONS

DECISION

[1] An extension of time to apply for leave to appeal is refused, as is the application for leave to appeal.

OVERVIEW

[2] At its root, this case is about the amount of an overpayment that the Applicant, H. H. (Claimant), must repay. He applied for and received Employment Insurance regular benefits following a shortage of work, but he remained on call with his employer. He was called back and worked for one week. His employer paid him weeks later. The Respondent, the Canada Employment Insurance Commission (Commission), determined that this payment constituted earnings that had to be allocated to the week when the Claimant worked. This resulted in an overpayment. The Claimant requested a reconsideration and then appealed the Commission's reconsideration decision to the General Division.

[3] The General Division determined that the earnings allocation had to be corrected to reflect gross insurable earnings, rather than basic pay. Effectively, this resulted in a greater overpayment, although the General Division did not specify the amount of that overpayment. The Claimant is now seeking leave to appeal the General Division's decision. He argues that new evidence shows that the overpayment should have remained at $191, rather than increase by an additional $417, which the Commission is now seeking.[1]

[4] I must decide whether the Claimant filed the application to the Appeal Division on time and, if not, whether I should extend the time for filing. If I extend the time for filing the application to the Appeal Division, I must also determine whether the appeal has a reasonable chance of success.

[5] I am refusing an extension of time and refusing leave to appeal because I am not satisfied that the Claimant has an arguable case.

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[1] Statement of Account, AD1-10.

ISSUES

[6] The issues are:

(a) Did the Claimant file his application seeking leave to appeal with the Appeal Division on time?

(b) If the Claimant was late in filing his application to the Appeal Division, should I extend the time for filing?

(c) If I extend the time for filing the application to the Appeal Division, does the appeal have a reasonable chance of success?

ANALYSIS

Issue 1: Did the Claimant file his application seeking leave to appeal with the Appeal Division on time?

[7] No. I find that the Claimant was late in filing his application to the Appeal Division.

[8] In the case of a decision made by the Employment Insurance section, under section 57(1)(a) of the *Department of Employment and Social Development Act* (DESDA), an application for leave to appeal must be made to the Appeal Division within 30 days after the day on which the decision was communicated to the Claimant.

[9] The General Division rendered its decision on May 7, 2018. The Claimant did not indicate when the General Division's decision was communicated to him. Under section 19 of the *Social Security Tribunal Regulations*, the General Division's decision is deemed to have been communicated to the Claimant 10 days after the day on which it was mailed to him. From what I can determine, the Social Security Tribunal mailed the General Division's decision to the Claimant on May 8, 2018. The General Division's decision is therefore deemed to have been communicated to the Claimant on May 18, 2018, and the Claimant was required to have filed an application within 30 days, by no later than June 17, 2018. The Claimant dated his application to the Appeal Division "2018-10-22," but the Social Security Tribunal's date stamp states November 30, 2018. The Claimant was clearly late when he filed his application to the Appeal Division on November 30, 2018, more than five months after the deadline.

Issue 2: Should I extend the time for filing the application to the Appeal Division?

[10] No. Largely because I have found that there is no arguable case in paragraph 15 of this decision, I find that it is against the interests of justice to exercise my discretion and grant an extension of time for filing.

[11] Section 57(2) of the DESDA states that the Appeal Division may allow further time within which an application for leave to appeal may be made, but in no case may an application be made more than one year after the day on which the decision was communicated to an appellant.

[12] In deciding whether to grant an extension of time to file an application for leave to appeal, the overriding consideration is the interests of justice. In *X (Re)*[2] and in *Canada (Attorney General) v Larkman*,[3] the Federal Court of Appeal identified the relevant factors for consideration:

(a) whether there is an arguable case on appeal or some potential merit to the application;

(b) whether there are special circumstances or a reasonable explanation for the delay;

(c) whether the delay is excessive; and

(d) whether the respondent will be prejudiced if the extension is granted.

[13] In *Larkman*, the Federal Court of Appeal also examined whether the party had a continuing intention to pursue the application.

[14] Turning to the matter before me, I find that the Commission is unlikely to face any prejudice if an extension is granted. Indeed, the Commission was already aware of the Claimant's concerns as early as July 2018.[4] Although the application was filed several months late, the delay is not overly excessive. Of greater concern is whether there is a reasonable

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[2] *X (Re)*, 2014 FCA 249.
[3] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[4] Commission's letter dated July 31, 2018, at AD1-6.

explanation for the delay and an arguable case for the appeal. The Claimant states that he "just very recently"[5] found his pay stubs from August to September 2015, although he does not state when exactly he found them. This does not necessarily show that the Claimant had a continuing intention to file an application because, until he found the pay stubs, there was no indication that he was going to even file an appeal. It is unclear why the Claimant was unable to file an appeal before locating the pay stubs.

[15] I will now examine whether there is an arguable case. In assessing whether there is an arguable case on appeal, I note that section 58(1) of the 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.

[16] The Claimant has not identified any grounds of appeal under section 58(1) of the DESDA. There is no suggestion that the General Division deprived the Claimant of an opportunity to fully present his case in the hearing before it, that it was biased against him, that it erred in law, or that it based its decision on an erroneous finding of fact without regard for the material before it. From this perspective, I find that the appeal does not have a reasonable chance of success.

[17] The Claimant notes that the General Division wrote at paragraph 14 of its decision that the Commission should investigate whether any compensation for mileage was considered earnings or was paid as a vehicle expense. The Claimant notes that the August to September 2015 pay stubs provide a breakdown of his income. He claims that the pay stubs reveal that the

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[5] Application seeking leave to appeal to the Appeal Division, at AD1-3 and AD1-5.

income includes vehicle expenses that the General Division should have excluded from the earnings allocation. As a result, he is requesting that the General Division re-adjust the earnings allocation by removing the mileage or vehicle expenses. He argues that once the vehicle expenses are removed, the overpayment will revert to $191.

[18] The General Division obviously did not have the August to September 2015 pay stubs before it, so section 58(1)(c) of the DESDA is not relevant. The pay stubs represent "new evidence." Generally, new evidence is inadmissible before the Appeal Division, with some exceptions.[6] Those exceptions do not apply here. The alternative would be for the Claimant to apply to the General Division to rescind or amend its decision within the one-year deadline imposed under section 66 of the DESDA. This would involve returning the matter to the same General Division member to determine whether the pay stubs meet the materiality and discoverability tests under section 66 of the DESDA. In other words, the Claimant would have to establish that that new evidence is material since the evidence must reasonably be expected to affect the result of the earlier hearing. He would also have to establish that he was unable to discover this evidence at the time of the hearing with the exercise of reasonable diligence. It is questionable whether the Claimant would be able to prove that he could not have discovered the pay stubs with the exercise of reasonable diligence. I also find that it would unduly delay this matter.

[19] Essentially, the Claimant is arguing that the earnings allocation included amounts such as vehicle expenses that should have been excluded. However, I do not see that the General Division included any vehicle expenses in the earnings allocation.

[6] The Federal Court of Appeal set out the exceptions to the general rule against the admissibility of new evidence on appeal in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8.

Week Starting (2015)	Earnings Declared ($)	Earnings Allocation			Earnings Allocation Total ($)	General Division Allocation ($)
		Training or Work[7] ($)	Statutory Holiday Pay ($)	Additional Variable Allowance ($)		
August 9	538.00	522.30	1.03	23.50	546.53	546.83[8]
August 16	200.00	52.40 53.40 137.59	53.13	32.80 32.80 23.36	385.48	385.94[9]
August 23	400.00	55.71 55.71 55.71 55.71 55.71 77.20 77.20 77.20 77.20		57.46 57.46 57.46 57.46 57.46	874.65	874.65[10]
August 30	500.00	132.90 132.90 132.90 132.90 132.90	55.67	57.46 57.46 57.46 57.46 57.46	1,007.47	1,007.47[11]

[20] The earnings allocation included statutory holiday pay and variable allowances, but both items are considered earnings for the purposes of section 35(2) of the *Employment Insurance Regulations*[12] and were therefore properly included in the earnings allocation.

[7] Includes training, work sort, work full day, and work delivery.
[8] If the General Division had included the vehicle expenses of $27.85, the weekly earnings would have been $574.39. If the General Division had added just the vehicle expense to the pay (without holiday pay and the variable allowance), the weekly earnings would have been $549.86.
[9] If the General Division had included the vehicle expenses of $31.04, the weekly earnings would have been $416.52.
[10] If the General Division had included the vehicle expenses of $42.10, the weekly earnings would have been $916.75.
[11] If the General Division had included the vehicle expenses of $42.10, the weekly earnings would have been $1,049.57.
[12] Section 35(2) of the *Employment Insurance Regulations* defines earnings as the "entire income of a claimant arising out of any employment" while, under section 35(1), income is defined as "any pecuniary or non-pecuniary income that is or will be received by the claimant from an employer or any other person."

[21] Given these considerations, I do not see an arguable case that the earnings allocation was incorrect. The earnings allocation properly included the Claimant's earnings from employment, statutory holiday pay, and variable allowances. The earnings allocation did not include vehicle expenses. The fact that the earnings were properly allocated is a compelling reason against granting the Claimant an extension of time for filing an application to the Appeal Division.

Issue 3: Does the appeal have a reasonable chance of success?

[22] Because I have decided against extending the time for filing the Claimant's application to the General Division, it is unnecessary for me to separately address this final issue, although I note that I have already found there to be no arguable case. The Federal Court of Appeal has held that an arguable case is the same test as a "reasonable chance of success on appeal."[13]

CONCLUSION

[23] An extension of time to apply for leave to appeal is refused, as is the application for leave to appeal.

Janet Lew
Member, Appeal Division

SUBMISSIONS	H. H., Applicant

[13] *Fancy v Canada (Attorney General)*, 2010 FCA 63.