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

Citation: *M. C. v Canada Employment Insurance Commission*, 2018 SST 1307

Tribunal File Number: AD-18-845

BETWEEN:

M. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: December 27, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. C. (Claimant), applied for Employment Insurance benefits in May 2017. The Respondent, the Canada Employment Insurance Commission (Commission), initially accepted this application. However, the employer requested a reconsideration and the Commission changed its decision, finding on August 28, 2017, that the Claimant lost his job due to his own misconduct. As a result, the Claimant was disqualified from receiving benefits.

[3] The Claimant appealed the decision to the General Division of the Social Security Tribunal on December 5, 2017, but his application was incomplete until September 19, 2018. The General Division found that the Claimant's appeal was filed more than one year from the date that the reconsideration decision had been communicated to the Claimant, and it dismissed his appeal as a result. The Claimant now seeks leave to appeal to the Appeal Division.

[4] The Claimant has no reasonable chance of success. The Claimant has not identified any error of law, and I have been unable to discover any evidence that the General Division ignored or misunderstood.

ISSUE

[5] Is there an arguable case that the General Division erred in law by dismissing the appeal because it was filed late?

[6] Is there an arguable case that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it?

ANALYSIS

[7] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] To grant this application for leave and to allow the appeal process to move forward, I must first find that there is a reasonable chance of success on one or more of the grounds of appeal. A reasonable chance of success has been equated to an arguable case.[1]

Issue 1: Is there an arguable case that the General Division erred in law by dismissing the appeal because it was filed late?

[9] The Claimant argued that the General Division failed to consider his evidence that he did not receive "any form of correspondence of any reconsideration" through Canada Post.[2] The Claimant submits that this is an error of law.

[10] The General Division applied section 52(2) of the DESD Act which states that in no case may an appeal be brought more than a year after the day that the decision is communicated to the appellant (the Claimant, in this case). This means that the General Division has no jurisdiction to consider an appeal that is more than one year late.

[11] The General Division accepted that the reconsideration decision should be deemed to have been communicated by mail on September 11, 2017, the date which is 10 business days from the date it was mailed. According to section 19(1)(a) of the *Social Security Tribunal Regulations* (Regulations) a decision sent by ordinary mail is deemed to have been communicated to a party 10 days after the date of mailing.

[12] To "deem" means to presume, and the presumption of communication in section 19(1)(a) of the Regulations may be overcome by contrary evidence. If the General Division had understood that it must "deem" the decision to have been communicated 10 days from the date of

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[1] *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.
[2] GD2-3.

mailing without regard for evidence of some other actual communication date, this may well have been an error of law.

[13] However, there is no arguable case that the General Division failed to consider evidence of an actual communication date that was different from the deemed communication date. The only evidence to suggest an alternate communicate date is the Claimant's recollection that he never received the mailed reconsideration decision from the Commission and that he only became aware of it after receiving the notice of debt.[3] The General Division acknowledged the Claimant's evidence, but the General Division did not accept this explanation as credible.

[14] The General Division gave several reasons for this. It noted that the General Division mailed a separate request to the Claimant that he complete his appeal, and the Claimant said that he did not receive this either. The General Division's request was mailed from an independent source, at a date several months after the reconsideration decision had been mailed by the Commission. The fact that the Claimant would not have received either correspondence despite the differences in their source and the timeframe in which they were mailed means that it is less likely that the reconsideration decision vanished as a result of a processing problem at the Commission. The Claimant acknowledged receipt of the mailed notice of debt,[4] which demonstrates that he could receive mail at his address. Furthermore, the reconsideration decision was addressed to the same postal address that the Claimant gave as a return address on his notice of appeal,[5] which reveals that his address had not changed. This makes it less likely that the mail was misdirected by Canada Post. Finally, the Claimant provided no evidence of any particular mail delivery issues or other explanation as to why he would not have received mail directed to his address.[6] Based on these factors, the General Division did not accept the Claimant's assertion that he had not received the reconsideration decision.

[15] Had the General Division accepted that the appeal was filed on December 5, 2017 (the date that the incomplete appeal was received), the Claimant's appeal would have been within one year of the date the decision was deemed communicated. However, the appeal would still have been late. The General Division could not have granted an extension of time unless the Claimant

[3] General Division decision at para 5.
[4] *Ibid*. at para 12.
[5] *Ibid*. at para 9.
[6] *Ibid*. at para 9.

established that he had a reasonable explanation for the delay, that he had a continuing intention to appeal throughout the delay, that the delay was not such as to prejudice the Respondent's ability to respond, and that that the Claimant's appeal would have a reasonable chance of success.

[16] In any event, section 24(1) of the Regulations stipulates that an "appeal" must contain certain elements, including a copy of the reconsideration decision. There is no arguable case that the General Division erred in law when it determined that the appeal was not filed until it satisfied the requirements of section 24(1).

[17] I acknowledge that the Claimant disagrees with the manner in which the General Division assessed the evidence and with its finding against his credibility. However, simply disagreeing with the General Division's findings is insufficient to establish a ground of appeal under section 58(1) of the DESD Act.[7] Nor does a request to reweigh the evidence establish a ground of appeal that has a reasonable chance of success.[8]

[18] There is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act when it applied section 52(2) of the DESD Act to find that it could not consider the appeal because it was brought more than a year after the day that the decision was communicated to the Claimant.

[19] I note that the General Division was mistaken as to the deemed delivery date in that section 19(1)(a) stipulates "10 days" and not "10 business days". However, the error is a minor one which could not have had any effect on the result. The Claimant's appeal would have been filed with the General Division after more than a year had lapsed whether the decision was deemed to have been communicated on September 11, 2017, or more properly deemed to have been communicated on September 7, 2017.

[7] *Griffin v Canada (Attorney General)*, 2016 FC 874.
[8] *Tracey v Canada (Attorney General)*, 2015 FC 1300.

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it?

[20] The only ground of appeal that the Claimant selected was the ground of appeal concerned with "error of law". However, the Claimant suggests that the General Division ignored his evidence that he did not receive any correspondence by Canada Post. As noted, the General Division clearly referred to this evidence[9] but did not accept it as credible. There is therefore no arguable case that the General Division ignored or misunderstood this evidence.

[21] In accordance with the Federal Court's direction in *Karadeolian v Canada (Attorney General),*[10] I have reviewed the record for any other evidence that might have been ignored or overlooked and that may, therefore, raise an arguable case under section 58(1)(c). I have not discovered any significant evidence that could have been relevant to the General Division's decision but which was arguably ignored or misunderstood. Nor is there an arguable case that any of the General Division's findings, including its finding on the Claimant's credibility, might be considered perverse or capricious, in light of the evidence available.

[22] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	M. C., self-represented

[9] General Division decision at paras 5 and 7
[10] *Karadeolian v Canada (Attorney General)*, 2016 FC 615.