



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. K. v Canada Employment Insurance Commission*, 2019 SST 143

Tribunal File Number: AD-19-20

BETWEEN:

J. K.

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: February 20, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, J. K. (Claimant), worked at the same time that he collected Employment Insurance benefits. He reported his hours and earnings but the Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant had underreported his income. The Commission allocated the additional income as earnings, which resulted in an overpayment that the Claimant was required to repay.

[3] The Claimant requested a reconsideration of the overpayment, but the Commission maintained its decision. The Claimant's appeal to the General Division of the Social Security Tribunal was dismissed, and the Claimant now seeks leave to appeal to the Appeal Division.

[4] 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 has not provided a reasonable explanation for why his application was late, and he does not have an arguable case.

PRELIMINARY MATTERS

Was the application for leave to appeal filed late?

[5] 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.

[6] 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 November 21, 2018, and was sent by ordinary mail with

a letter dated November 22, 2018. Therefore, the Claimant is deemed to have received the decision on December 2, 2018.

[7] The Appeal Division did not receive the Claimant's application for leave to appeal until January 7, 2018, which is 35 days from the date that the decision is deemed to have been communicated to him and five days beyond 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 an extension of time is granted, 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 for an applicant to make an application for leave to appeal. 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.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.

¹ *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*,² 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 “hadn’t received the answer until late.” No other explanation was given.

[13] The leave to appeal application is only five days late. This is not a significant enough delay for me to conclude that the Claimant did not have a continuing intention to pursue his appeal, so I will accept that this factor weighs in favour of allowing the leave application to proceed.

[14] However, the Claimant did not explain why he filed his application late beyond stating that he did not receive “the answer”—presumably the General Division decision—until “late.” I do not know the circumstances that might have caused the decision to arrive late or the date on which the Claimant actually received it. Therefore, I do not accept that the Claimant has provided a reasonable explanation for why his application for leave was filed late. This factor weighs against allowing the leave to appeal application to proceed.

[15] The five-day delay presents no prejudice to the Commission in relation to its ability to investigate or otherwise respond to the leave to appeal application. This factor is in favour of allowing the application to proceed.

[16] The final *Gattellaro* factor is whether the Claimant has an arguable case. An arguable case has been equated to a reasonable chance of success.³ This is the same decision that I would have to make on the leave to appeal application, if I were to grant the extension.

² *Canada (Attorney General) v Larkman*, 2012 FCA 204.

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

[17] 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] 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. He submits that the General Division member estimated his overpayment at about \$800.00 but that he received a final notice from the Commission for \$1700.00, and he argues that he had received incorrect advice from Employment Insurance, that his employer made payroll mistakes, and that he is suffering from stress and anxiety. However, none of this suggests that the General Division erred in law under section 58(1)(b) of the DESD Act.

[19] I have followed the lead of the Federal Court in cases such as *Karadeolian*,⁴ in which it stated that “the Tribunal must be wary of mechanistically applying the language of section 58 of the [DESD Act] when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party....”

[20] Accordingly, I reviewed the record for any significant evidence that was overlooked or misunderstood or any other obvious error. I was unable to discover 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 for the material before it.

[21] The Claimant does not have an arguable case that the General Division erred under section 58(1) of the DESD Act.

⁴ *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

[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 refused.

[25] For the Claimant's information, I note that the Commission has provided submissions to the Appeal Division in which it deducts from the \$1716.00 overpayment certain overpayments and cancelled overpayments to arrive at a final net overpayment of \$827.00. The Claimant may wish to contact the Commission to confirm the amount of the overpayment that the Commission requires to be repaid.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	J. K., self-represented
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