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

Citation: *R. P. v Canada Employment Insurance Commission*, 2019 SST 293

Tribunal File Number: AD-19-94

BETWEEN:

R. P.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Jude Samson

Date of Decision: March 19, 2019

Canada

DECISION AND REASONS

DECISION

[1] The applications for an extension of time to apply for leave to appeal and for leave to appeal are both refused.

OVERVIEW

[2] R. P. (Claimant) was receiving regular Employment Insurance (EI) benefits when he started working for a company that provided temporary labour services to its clients. In February 2015, that company issued a Record of Employment indicating that it had paid wages to the Claimant during some of the same weeks in which he had received EI benefits and that he had quit his job on January 5, 2015. When the Canada Employment Insurance Commission (Commission) learned of this, it demanded that the Claimant repay some of the EI benefits that he had received, disqualified him from receiving EI benefits after quitting his job, imposed a $564 penalty, and issued a notice of violation against the Claimant for knowingly making false representations to the Commission.

[3] The Claimant challenged the Commission's decision. As part of its reconsideration process, the Commission reduced the amount of the penalty and cancelled the notice of violation; however, it maintained its disqualification decision. The Claimant then challenged the Commission's reconsideration decision to the Tribunal's General Division, but the General Division dismissed his appeal. In short, the General Division concluded that the Claimant had voluntarily left his job despite having reasonable alternatives to doing so. As a result, he did not have just cause for leaving his job and was disqualified from receiving EI benefits, as described in sections 29 and 30 of the *Employment Insurance Act* (EI Act).[1]

[4] The Claimant now wants to appeal the General Division decision to the Tribunal's Appeal Division, but he has two preliminary hurdles to overcome before the file can move forward. First, because the Claimant's request for leave to appeal was filed after the 30-day

[1] At the General Division hearing, the Claimant did not dispute the Commission's penalty decision.

deadline had expired, he needs an extension of time. Second, like most appeals before the Tribunal's Appeal Division, he also needs leave (or permission) to appeal.

[5] Unfortunately for the Claimant, I have concluded that he has not overcome either of these preliminary hurdles.

ISSUES

[6] In reaching this decision, I focused on the following issues:

a) Was the Claimant's request for leave to appeal filed late?

b) Should the Claimant be given an extension of time to request leave to appeal?

c) Should the Claimant be granted leave to appeal?

ANALYSIS

Issue 1: Was the Claimant's request for leave to appeal filed late?

[7] Yes, the application requesting leave to appeal was late.

[8] Applications requesting leave to appeal are due within 30 days of when claimants receive the General Division decision, but the Appeal Division can allow extensions of time so long as the application is filed less than a year late.[2]

[9] In this case, the General Division decision is dated November 26, 2018, and the Claimant admits that he received it in early December.[3] The Claimant's request for leave to appeal was therefore due in early January, but the Tribunal received it only on February 1, 2019. As a result, the Claimant's request for leave to appeal was filed less than a year late.

Issue 2: Should the Claimant be given an extension of time to request leave to appeal?

[10] The Claimant has not met the legal test for obtaining an extension of time.

---

[2] *Department of Employment and Social Development Act* (DESD Act), ss 57(1)(a) and 57(2).
[3] AD1-9.

[11] When deciding this issue, I considered and weighed the following four factors:[4]

a) Has the Claimant shown a continuing intention to pursue his appeal?

b) Has he provided a reasonable explanation for the delay?

c) Would any other party be prejudiced by the granting of the extension?

d) Is there an arguable case on appeal?

[12] Not all four factors need to be met; the overriding consideration is that the interests of justice be served.[5]

A continuing intention to pursue the appeal

[13] The Claimant states that he formed the intention of appealing the General Division decision soon after receiving the decision. However, there is no evidence that he ever communicated that intention either to the Tribunal or to the Commission. As a result, I find that this factor has not been met.

A reasonable explanation for the delay

[14] The cover letter that the Tribunal sent with General Division decision clearly described that the Claimant's application for leave to appeal was due within 30 days. However, the Claimant wanted help from a lawyer to file his appeal.[6] According to the Claimant, he met with a lawyer from Neighbourhood Legal Services in January, but the lawyer needed time to review the file, research the relevant issues, and prepare the necessary paperwork.

[15] In my view, it was reasonable for the Claimant to try to find a lawyer to help with his case, and I recognize how that might have taken extra time over the holidays. However, it remains a bit unclear why it took Neighbourhood Legal Services three to four weeks to file the request for leave to appeal.

---

[4] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.
[5] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[6] AD1-9.

[16] I have concluded that this factor is neutral.

Prejudice to another party

[17] Given the Commission's resources and the availability of relevant documents, there is no obvious reason why the Commission's ability to respond to the appeal would be unduly affected by allowing the extension of time.

Arguable case

[18] In my view, the Claimant has not raised an arguable case on appeal.

[19] In its decision, the General Division asked and answered two main questions: Did the Claimant voluntarily leave his employment, and, if so, did he have just cause for doing so? The General Division answered yes to the first question and no to the second one.

[20] For the first question, the General Division focused on the relevant legal test by asking whether the Claimant had a choice to stay or leave his employment.[7] The General Division noted that, according to the employer's policy, workers had to come to its offices each day to see whether there was any work available for them. If a worker did not come to their offices for 30 days, then the employer considered that they had quit and issued a Record of Employment, which is what happened to the Claimant in this case.[8]

[21] The Claimant seems to be arguing that the General Division decision is based on an error of fact because the Claimant never **intended** to quit. Instead, he was **deemed** to have quit based on the employer's policies, effectively mischaracterizing the Claimant's intentions.

[22] I recognize that erroneous findings of fact are one of the three grounds that can justify the Appeal Division's intervention in a case; however, an erroneous finding must be made in a perverse or capricious manner or without regard for the material before it.[9] In my view, the

[7] General Division decision at para 11; *Canada (Attorney General) v Peace*, 2004 FCA 56 at para 15.
[8] GD3-79.
[9] DESD Act, s 58(1)(c).

Claimant has not raised an arguable case that the General Division decision contains an error that might meet this definition.

[23] Indeed, the Claimant has not seriously challenged any of the key legal or factual findings on which the General Division based its conclusion. More specifically, there is no dispute as to the relevant legal test, the terms of the employer's policy, or the fact that the Claimant did not go to the employer's offices for 30 days before it issued his Record of Employment. At best, therefore, the Claimant disagrees with the General Division's application of settled principles to the facts of his case, but such an argument falls outside the three grounds of appeal that authorize the Appeal Division's intervention in a particular case.[10]

[24] For the second question—whether the Claimant had just cause for leaving his employment—the General Division referred to the relevant legal test by asking whether, having regard to all the circumstances, the Claimant had no reasonable alternative to leaving his employment.[11] While the General Division recognized that the Claimant had good reasons for trying to find another job, it concluded that the Claimant could reasonably have maintained one job while looking for another. In this respect, the General Division's conclusion was supported by binding decisions from the Federal Court of Appeal.[12]

[25] Nevertheless, the Claimant's representative argues that the General Division decision is based on a second error of fact, which he describes as follows:[13]

> The combination of the winter weather, the holidays, the scarcity of work and his physical health make it reasonable that [the Claimant] would be unwilling to "report" to the office, even if it led to him being mistakenly characterized as having quit altogether. These contextual factors were not given due consideration in the decision of the Tribunal and represent an additional erroneous finding of fact sufficient to warrant leave to appeal.

[26] In my view, this argument repeats points that the General Division has already considered. The Appeal Division is not authorized to intervene in a case because certain factors

---

[10] *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9; *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 7.
[11] General Division decision at paras 14-15.
[12] *Canada (Attorney General) v White*, 2011 FCA 190 at para 11.
[13] AD1-8.

should have been balanced differently.[14] The Appeal Division's role is limited: it is not a place for the Claimant to reargue his case in hopes of getting a different result.[15] In addition, and as mentioned above, the Appeal Division has no power to intervene just because the Claimant disagrees with how the General Division applied settled legal principles to the facts of his case.

[27] For all of these reasons, I was unable to conclude that the Claimant raised an arguable case on appeal.

[28] Regardless of this conclusion, I am mindful of Federal Court decisions in which the Appeal Division has been told to go beyond the four corners of the claimant's request for leave to appeal and to assess whether the General Division might have misinterpreted or failed to properly consider relevant evidence.[16] After reviewing the documentary record, listening to the recording of the hearing, and examining the decision under appeal, I am satisfied that the General Division neither misinterpreted nor failed to properly consider any relevant evidence.

Conclusion on the extension of time

[29] Though the factors above lean towards refusing the Claimant's request for an extension of time, I have also made an overall assessment of what the interests of justice might require. In this respect, I acknowledge that the refusal to grant an extension of time means that the Claimant's appeal ends here, but I must weigh that against the extent to which the interests of justice would be served by allowing an appeal to proceed even though it has no reasonable chance of success.

[30] I am aware of cases in which the Federal Court and Federal Court of Appeal have given particular weight to the arguable case factor, and I find that that factor is entitled to significant weight in this case too.[17]

---

[14] DESD Act, s 58(1).
[15] *Bellefeuille v Canada (Attorney General)*, 2014 FC 963 at para 31; *Rouleau v Canada (Attorney General)*, 2017 FC 534 at para 42.
[16] *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.
[17] *McCann v Canada (Attorney General)*, 2016 FC 878; *Maqsood v Canada (Attorney General)*, 2011 FCA 309.

[31] Having considered the four factors above and the interests of justice, I have decided that the extension of time needed to request leave to appeal should be refused.

Issue 3: Should the Claimant be granted leave to appeal?

[32] No, leave to appeal should be refused in this case.

[33] Leave to appeal is granted unless the appeal has "no reasonable chance of success."[18]

[34] While this legal test is different from the one discussed above—whether the Claimant has "an arguable case on appeal"—the courts have interpreted the two tests as being essentially the same.[19] In both cases, the threshold is a low one: Is there any arguable ground on which the appeal might succeed?

[35] As a result, having already concluded that there were no arguable grounds on which the appeal might succeed, I can also conclude that the appeal has no reasonable chance of success, and that leave to appeal must be refused.

CONCLUSION

[36] The Claimant requires an extension of time and leave to appeal for this matter to move forward. I have refused both, even though I do sympathize with the Claimant's circumstances.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	Lawrence Burns, for the Applicant

[18] DESD Act, ss 58(2) and 58(3).
[19] *Osaj v Canada (Attorney General)*, 2016 FC 115, at paragraph 12; *Ingram v Canada (Attorney General)*, 2017 FC 259, at paragraph 16; *Fancy v Canada (Attorney General)*, 2010 FCA 63.