



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *I. M. v Canada Employment Insurance Commission and X*, 2019 SST 308

Tribunal File Number: AD-19-109

BETWEEN:

I. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Jude Samson

Date of Decision: March 29, 2019

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] I. M. (Claimant) received regular Employment Insurance (EI) benefits from March to December 2014. Later, the Canada Employment Insurance Commission (Commission) learned that X (Employer) had dismissed the Claimant for misconduct in August 2014. Following an investigation, the Commission demanded that the Claimant reimburse over \$10,500. More specifically, the Commission imposed the following on the Claimant:

- a) an indefinite disqualification effective August 17, 2014, because the Claimant had lost his job as a result of his own misconduct;
- b) a disentitlement from June 9, 2014, to August 15, 2014, because the Claimant had failed to prove his availability for work between these dates;
- c) an adjustment of earnings for the weeks beginning March 16 to May 11, 2014, based on information received from the Employer;
- d) a monetary penalty of \$982 for making five false statements; and
- e) a very serious violation, also for making five false statements.

[3] The Claimant challenged the Commission's decision, but the Commission maintained it on reconsideration. The Claimant then challenged the Commission's reconsideration decision to the Tribunal's General Division, but the General Division dismissed his appeal.

[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

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 request for leave to appeal was filed 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.¹

[9] In this case, the cover letter that the Tribunal sent with the General Division decision is dated August 21, 2018. This letter explained to the Claimant that his appeal, should he wish to file one, was due within 30 days.

[10] Although the Claimant was asked, he did not specify when he received the General Division decision.² Nevertheless, I am able to assume that the Claimant received the General

¹ *Department of Employment and Social Development Act* (DESD Act), ss 57(1)(a) and 57(2).

² See the Tribunal's letter dated February 12, 2019, and the Claimant's response dated March 25, 2019 (AD3).

Division decision 10 days after the Tribunal sent it to him.³ As a result, his request for leave to appeal was due on September 20, 2018.

[11] Instead, however, the Claimant first contacted the Tribunal on October 23, 2018, to request the forms for filing an appeal. And even though the Tribunal sent the required forms to the Claimant on the same day, the Claimant did not return the completed forms to the Tribunal until February 6, 2019.⁴

[12] As a result, the Claimant's request for leave to appeal was filed late, albeit by less than a year.

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

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

[14] When deciding this issue, I considered and weighed the following four factors:⁵

- 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?

[15] Not all four factors need to be met; the overriding consideration is that the interests of justice be served.⁶

A continuing intention to pursue the appeal

[16] The Claimant says that he contacted the "EI office" about how to appeal and to make a payment arrangement, but precisely when he made that contact is unknown.⁷ Indeed, by the time

³ *Social Security Tribunal Regulations*, s 19(1)(a).

⁴ AD1.

⁵ *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

⁶ *Canada (Attorney General) v Larkman*, 2012 FCA 204.

⁷ See AD1-4 and the Tribunal's request for additional information dated February 12, 2019.

the Claimant contacted the Tribunal to request the forms for filing an appeal, the 30-day deadline had already passed by about a month. As a result, I find that this factor has not been met.

A reasonable explanation for the delay

[17] The Claimant explained that his appeal was late because he was gathering additional medical information. As will be discussed further below, however, new evidence is not a recognized ground of appeal and the Appeal Division rarely accepts it. In addition, the Claimant has not explained why the gathering of new evidence took so long or why the new evidence and his request for leave to appeal had to be filed at the same time.

[18] In my view, this factor has not been met.

Prejudice to another party

[19] 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

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

[21] A critical part of this case concerned the Employer's decision to terminate the Claimant's employment for unauthorized absenteeism. In response, the Claimant argued that he was unable to work because of pain in his back.

[22] The Claimant's absences from work were an ongoing issue between him and his Employer, and the Employer had doubts about the Claimant's honesty. In keeping with its policies, therefore, the Employer insisted that the Claimant's absences be supported by a doctor's note. In the end, however, the Claimant missed five days of work in August 2014, had no medical note to justify his absences, and was dismissed because of it. In addition, the General Division concluded that the Claimant's absences amounted to misconduct, as defined under the *Employment Insurance Act*.

[23] On appeal, the Claimant has filed additional medical evidence to support the severity of his back pain.⁸ But new evidence is not a ground of appeal that allows the Appeal Division to intervene in a particular case.⁹ In addition, the Claimant's Employer terminated him for not providing timely medical information in support of his absences. Providing new medical information to the Tribunal in 2019 is not relevant to the Claimant's misconduct in 2014.

[24] Indeed, the Claimant has not seriously challenged any of the key legal or factual findings on which the General Division based its decision. Instead, he has advanced very general arguments about the unfairness of the General Division decision because he honestly did have health issues and because he is being asked to reimburse too much money.¹⁰

[25] 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.¹¹ In addition, the Appeal Division has no power to intervene just because the Claimant disagrees with how the General Division applied established legal principles to the facts of his case.¹²

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

[27] 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.¹³ After reviewing the documentary record, listening to the audio 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.

⁸ AD1-6 to AD1-11.

⁹ DESD Act, s 58(1); *Tracey v Canada (Attorney General)*, 2015 FC 1300; *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73.

¹⁰ AD3.

¹¹ *Bellefeuille v Canada (Attorney General)*, 2014 FC 963 at para 31; *Rouleau v Canada (Attorney General)*, 2017 FC 534 at para 42.

¹² *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9; *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 7.

¹³ *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.

Conclusion on the extension of time

[28] 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.

[29] 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.¹⁴

[30] 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?

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

[32] Leave to appeal is granted unless the appeal has "no reasonable chance of success."¹⁵

[33] 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.¹⁶ In both cases, the threshold is a low one: Is there any arguable ground on which the appeal might succeed?

[34] As a result, since I have already concluded that there is no arguable case on appeal, I can also conclude that the appeal has no reasonable chance of success, and that leave to appeal must be refused.

¹⁴ *McCann v Canada (Attorney General)*, 2016 FC 878; *Maqsood v Canada (Attorney General)*, 2011 FCA 309.

¹⁵ DESD Act, ss 58(2) and 58(3).

¹⁶ *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.

CONCLUSION

[35] 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:	I. M., self-represented
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