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

Citation: R. M. v Canada Employment Insurance Commission, 2019 SST 391

Tribunal File Number: AD-19-136

BETWEEN:

R. M.

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: April 30, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. M. (Claimant), was dismissed for failing to report to work or explain the reason for her absence. When she applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), denied her claim. It found that the Claimant had been dismissed for misconduct, and she was therefore disqualified from receiving benefits. The Claimant requested a reconsideration but the Commission maintained its original decision.

[3] The Claimant next appealed to the General Division of the Social Security Tribunal. A teleconference hearing was scheduled but the Claimant did not join the hearing on the scheduled date. The General Division was satisfied that the Claimant received notice of the hearing and proceeded to make its decision based on the record. It issued a decision to dismiss the Claimant's appeal on July 25, 2018. The Claimant requested leave to appeal the General Division decision to the Appeal Division. The Appeal Division received her request on February 5, 2019.

[4] The request for leave to appeal is late, and it is not in the interests of justice to allow the appeal to proceed. The Claimant has not provided a reasonable explanation for the lateness of her appeal or established that she had a continuing intention to pursue the application. In addition, the Claimant has not raised an arguable case that might be successful on appeal.

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 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. The Claimant indicated that the "reconsideration decision" was received in September 2018 (but also selected "I do not remember") in the materials that the Appeal Division accepted as her leave to appeal application, but she had used the wrong form. Given that she had already appealed the January 12, 2018, reconsideration decision by February 2018, I presume that the Claimant meant that it was the General Division decision that was received in September 2018.

[7] When there is no evidence of the actual date that the decision was communicated to the Claimant, section 19(1) of the *Social Security Tribunal Regulations* (Regulations) deems the decision to have been communicated ten days from the date on which it is mailed. Because the decision is dated July 25, 2018, and was sent by regular mail with a letter dated July 30, 2018, I accept that the decision was communicated on August 9, 2018, in accordance with section 19(1) of the Regulations. The Claimant's simple assertion that she received the decision in September 2018, by itself, is insufficient to overcome the regulatory presumption that the decision was communicated ten days from the date that it was mailed.

[8] The Appeal Division did not receive the Claimant's application for leave to appeal until February 5, 2019. Accepting that the decision was communicated on August 9, 2018, the application for leave to appeal is 180 days late. Even if I were to accept that the decision was not communicated until September 2018, and that it was communicated on the last day of that month, the Claimant's application for leave would still be 137 days late.

[9] The application for leave to appeal is late.

ISSUE

[10] Should the Appeal Division exercise its discretion to grant an extension of time to file the leave to appeal application?

ANALYSIS

[11] 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.

[12] 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.

Should the Appeal Division exercise its discretion to grant an extension of time to file the leave to appeal application?

Continuing intention

[13] I find that the Claimant has not demonstrated a continuing intention to pursue the appeal. The Claimant filed her application for leave to appeal more than five months after the date that the General Division decision was communicated to her. In that period, she did not attempt to file an application, nor did she write, call or email to seek information or advice or inform the Tribunal of her intention to appeal. The Tribunal was not aware that the Claimant intended to appeal until it received the materials that it accepted as her application for leave to appeal on February 5, 2019.

[14] I wrote the Claimant on March 22, 2019, requesting that she elaborate on her reasons for delaying her application for leave to appeal. The Appeal Division received a response from the Claimant's new representative on April 2, 2019.[3] (The Claimant had represented herself in her appeal to the General Division, but obtained a new representative for the Appeal Division.) The representative stated that the Claimant has been attempting to obtain a hearing since the

[1] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883; *Muckenheim v Canada (Employment Insurance Commission)*, 2008 FCA 249.
[2] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[3] AD1B-2

representative returned in January to the community unemployed help centre where he worked. The representative did not say when in January he returned to work, or when the Claimant first contacted him. The representative also did not identify what efforts the Claimant had made to "obtain a hearing" or whether the representative could confirm those efforts. More to the point, the representative does not suggest that the Claimant took any steps to contact the Tribunal or to obtain other representation during the several-month period before the representative began to act on her behalf.

[15] The Claimant has not established that she had a continuing intention to pursue an appeal to the Appeal Division. My findings on this factor weigh against allowing the leave to appeal application to proceed.

Reasonable explanation

[16] The Claimant also does not have a reasonable explanation for the delay. The only explanation given by the Claimant is that she had not had help and did not understand the process. I appreciate that it can be difficult to understand the process, but I am not satisfied that it should have taken five months to even express that difficulty. There is no evidence that the Claimant made any effort to seek help or advice for several months. This factor weighs against allowing the leave to appeal application to proceed.

Prejudice to the other party

[17] The representative has suggested that the lateness of the leave to appeal application would have no negative impact on the Commission. I agree. While it is possible that the approximately five and a half month delay (after the 30-day filing deadline) could prejudice the Commission's ability to investigate or otherwise respond to the leave to appeal application, the Commission has not argued this, or supported such an argument with evidence. This factor weighs in favour of allowing the leave to appeal application to proceed.

Arguable case

[18] The final *Gattellaro* factor is whether the Claimant has an arguable case. An arguable case has been equated to a reasonable chance of success.[4] This is essentially the same question I would have to decide on the leave to appeal application, if I were to grant the extension of time.

[19] 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.

[20] The Claimant has not clearly identified in what way she believes the General Division to have made any of these errors. Her representative says that the Claimant made numerous attempts to inform her employer of her absence. The General Division understood from her own statements to the Commission that she had taken a leave without authorization.[5]

[21] In her application for benefits the Claimant said that she was dismissed because she took a leave but did not return on the day she said she would. The Claimant also said that she could not find a manager but that she had informed a Council member in the Band office that she would not be coming in to work.[6] She said that she had completed, or at least submitted, a form requesting a leave that she obtained from the Video Lottery Terminal cashier.[7] The employer's manager stated that his cell, home and office phone contact information was posted[8] and he

[4] *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.
[5] GD3-25; GD3-33
[6] GD3-34
[7] *Ibid.*
[8] GD3-36

confirmed that the Claimant had not requested a leave from him. The employer said it was not aware the Claimant had any medical issues, had not received a leave request form from the Claimant, and could not confirm that it even had such forms.[9] The General Division had to weigh the evidence of both the Claimant and the employer.

[22] The Claimant seems to be asking for an opportunity to present additional evidence related to her "numerous attempts to inform the employer of his absence."[10] However, even if I were to grant an extension of time and allow the leave application to proceed, I would not be able to consider new evidence that was not before the General Division, nor would I be able to reweigh or reassess the evidence. This is not the role of the Appeal Division.[11]

[23] I do not accept that the General Division ignored or misunderstood any of the evidence before it when it found that that the Claimant had taken an unauthorized leave and failed to report to work for three consecutive days without informing the employer that she was not coming in to work. Therefore, there is no arguable case that the General Division erroneously found that the Claimant committed, or was engaged in, the conduct that the employer gave as its reason for dismissing the Claimant.

[24] I have followed the lead of the Federal Court in cases such as *Karadeolian v Canada (Attorney General),*[12] 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". Accordingly, I reviewed the record for any significant evidence that the General Division overlooked or misunderstood, and for any other obvious error.

[25] I was unable to discover an arguable case that the General Division erred under section 58(1)(c) of the DESD Act by basing 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.

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[9] *Ibid.*; GD3-38
[10] AD1-B
[11] *Tracey v. Canada (Attorney General)*, 2015 FC 1300
[12] *Karadeolian v Canada (Attorney General)*, 2016 FC 615

[26] The representative also noted that the Claimant is "simply asking for an opportunity to explain her side of the issue". The General Division made its decision on the record without hearing from the Claimant so it is possible that the representative is arguing that that the General Division interfered with the Claimant's natural justice right to be heard under section 58(1)(a) of the DESD Act.

[27] However, section 12(1) of the Regulations permits the General Division to proceed in a party's absence if it is satisfied that the party has received notice of the hearing. The General Division stated that it was satisfied that the Claimant had received notice[13], and the Claimant's representative confirmed that the Claimant had received the Notice of Hearing and information package.[14] The representative has not suggested that the Appeal Division gave the Claimant incorrect information about the hearing time and date or how to connect to the hearing. The information package provides standardized instructions for teleconference hearings which explains how parties are to call in at the appointed time to connect to the teleconference hearing.

[28] According to the representative, the Claimant waited for the telephone call for the June 14, 2018, hearing. However, there is no evidence that the Claimant made any attempt to call the Appeal Division when she did not receive the expected call from the General Division, or at any time in the six weeks between the scheduled hearing date and the date of the General Division decision. In fact, the Claimant did not make any effort to contact the Tribunal until almost eight months after the hearing date. If the Claimant missed the hearing because she misunderstood the teleconference instructions, she has failed to explain why she did not question why the hearing did not go ahead or seek to reschedule. I do not find an arguable case that the General Division failed to observe a principle of natural justice by proceeding on the record.

[29] Therefore, I find that the matter does not disclose an arguable case. This factor weighs against allowing the leave to appeal application to proceed.

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[13] General Division decision, para. 3
[14] AD1-B

[30] Three of the four *Gattellaro* factors weigh against allowing the extension of time, and the Claimant's inability to make out an arguable case is among them. In my view, it would not be in the interests of justice to allow the extension of time.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	Doug Simpson, for the Applicant