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

Citation: *G. M. v Canada Employment Insurance Commission*, 2019 SST 392

Tribunal File Number: AD-19-137

BETWEEN:

G. 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

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, G. M. (Claimant), was dismissed for failing to report to work or explain the reason for his absence. When he applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), denied his claim. It found that the Claimant had been dismissed for misconduct, and he 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 August 6, 2018. The Claimant requested leave to appeal the General Division decision to the Appeal Division. The Appeal Division received his 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 his appeal or established that he had a continuing intention to pursue the application. 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, in the materials that the Appeal Division accepted as his leave to appeal application, but he had used the wrong form. Given that he had already appealed the January 12, 2018, reconsideration decision by March 2018, I presume that the Claimant meant that the General Division decision 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 August 6, 2018, and was sent by regular mail with a letter dated August 8, 2018, I accept that the decision was communicated on August 18, 2018, in accordance with section 19(1) of the Regulations. The Claimant's simple assertion that he 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 18, 2018, the application for leave to appeal is 171 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 128 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?

<u>Continuing intention</u>

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

[14] I wrote the Claimant on March 22, 2019, requesting that he elaborate on his reasons for delaying his 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 been represented by his wife in his 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

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[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

since the 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 at the help centre, 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 representation during the several-month period before the representative began to act on his behalf.

[15] The Claimant has not established that he 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 he 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-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 he believes the General Division to have made any of these errors. His representative says that the Claimant made numerous attempts to inform his employer of his absence, a statement which is contrary to the General Division's summary of his evidence:

> The Appellant added that he did not report to work and did not contact his employer to let him know he was dealing with a medical situation involving his wife and he would not be into work, or that he needed a leave of absence, or report onsite to advise either his supervisor or a co-worker about his absence. [5]

[21] That the Appellant took a leave and did not go back to work on the day he was supposed to return is found in the Claimant's online application for benefits.[6] The Claimant provided

[4] *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.
[5] General Division decision, para. 11
[6] GD3-9

evidence that he did not contact the employer to let the employer know his wife was sick or go onsite to inform a co-worker or supervisor and that he did not have authorization for a leave of absence.[7] He also said that his manager was not available to talk to[8] and that he dropped off a leave of absence form with the cashier at the Video Lottery Terminal, that he had obtained from his wife.[9] The employer's evidence essentially confirmed that the Claimant was absent without explanation.[10] The employer's manager also stated that his cell, home and office phone contact information was posted.[11] 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.[12] The General Division had to weigh the evidence of both the Claimant and the employer, and, in the end, gave little weight to the Claimant's statement that he did obtain authorization because a manager was not available or that he submitted a leave request form.

[22] The Claimant seems to be asking for an opportunity to present additional evidence related to his "numerous attempts to inform the employer of his absence."[13] 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.[14]

[23] I do not accept that the General Division ignored or misunderstood any of the evidence before it when it found that the Claimant took a leave or failed to report to his employer as required without authorization or that he did not inform the employer of his reasons at the time. 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.

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[7] GD3-26; GD3-34
[8] GD3-33, GD3-34
[9] GD3-35
[10] GD3-35; GD3-37
[11] GD3-35
[12] GD3-37
[13] AD1-B
[14] *Tracey v. Canada (Attorney General)*, 2015 FC 1300

[24] I have followed the lead of the Federal Court in cases such as *Karadeolian v Canada (Attorney General)*,[15] 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.

[26] The representative also noted that the Claimant is "simply asking for an opportunity to explain his 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 receive notice of the hearing. The General Division stated that it was satisfied that the Claimant had received notice[16], and the Claimant's representative confirmed that the Claimant received the Notice of Hearing and information package.[17] 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 26, 2018, hearing. However, there is no evidence that the Claimant made any attempt to call the Tribunal when he did not receive the expected call from the General Division, or at any time in the seven weeks between the scheduled hearing date and the date of the General Division

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[15] *Karadeolian v Canada (Attorney General)*, 2016 FC 615
[16] General Division decision, para. 3
[17] AD1-B

decision. In fact, the Claimant did not make any effort to contact the Tribunal until more than seven months after the hearing date. If the Claimant missed the hearing because he misunderstood the teleconference instructions, he has failed to explain why he 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.

[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