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

Citation: P. M. v Canada Employment Insurance Commission, 2019 SST 399

Tribunal File Number: AD-19-283

BETWEEN:

P. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Janet Lew

Date of Decision: May 6, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, P. M. (Claimant), was on Employment Insurance benefits. He declared that he did not have any earnings for several weeks from January 3 through to the week of May 15, 2016. However, the Respondent, the Canada Employment Insurance Commission (Commission), subsequently determined that the Claimant had in fact received earnings during these weeks and that, accordingly, there had been an overpayment of benefits that he would be required to repay.[1]

[3] The Claimant appealed the Commission's reconsideration decision to the General Division. The General Division dismissed the appeal. The Claimant is now seeking leave to appeal the General Division's decision. He claims that the member was biased, that she refused to exercise her jurisdiction and that she failed to provide sufficient reasons.

[4] First off, I must decide whether the Claimant filed the application requesting leave to appeal on time and, if not, whether I should exercise my discretion and extend the time for filing the application requesting leave to appeal. Finally, if I should extend the time for filing the application requesting leave to appeal, I must then decide whether to grant leave to appeal. In deciding whether to grant leave to appeal, I must be satisfied that the appeal has a reasonable chance of success.

[5] For the reasons that follow, I am refusing both an extension of time and the application for leave to appeal because I am not satisfied that there is an arguable case.

ISSUES

[6] The issues are:

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[1] Commission's letter dated October 2, 2018, at GD3-21 to GD3-22.

Issue 1: Did the Claimant file his application requesting to leave to appeal on time?

Issue 2: If not, should I exercise my discretion and extend the time for filing the application requesting leave to appeal?

Issue 3: If I extend the time for filing, is there an arguable case that the General Division was biased, acted beyond or refused to exercise its jurisdiction, erred in law, or based its decision on an erroneous finding of fact without regard for the material before it?

ANALYSIS

Issue 1: Did the Claimant file his application requesting leave to appeal on time?

[7] No. I find that the Claimant failed to file an application requesting leave to appeal on time.

[8] Under subsection 57(1)(a) of the *Department of Employment and Social Development Act* (DESDA), an application for leave to appeal—in the case of a decision made by the Employment Insurance section—must be made to the Appeal Division within 30 days after the day on which it was communicated to an applicant.

[9] The Claimant does not disclose when the General Division's decision was communicated to him. I note, however, that he contacted the Social Security Tribunal by telephone on April 8, 2019, and acknowledged that he was already late in filing his application requesting leave to appeal.

Issue 2: Should I exercise my discretion and extend the time for filing the application requesting leave to appeal?

[10] Subsection 57(2) of the DESDA provides that I may allow further time within which an application for leave to appeal may be made, but in no case may an application be made more than one year after the day on which the decision was communicated to an appellant.

[11] In deciding whether to grant an extension of time to file an application for leave to appeal, the overriding consideration is the interests of justice.[2] In both *X (Re)* and *Canada*

[2] *X (Re)*, 2014 FCA 249; *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

(Attorney General) v. Larkman, the Federal Court of Appeal identified the relevant factors for consideration:

- there is an arguable case on appeal or some potential merit to the application;

- there are special circumstances or a reasonable explanation for the delay;

- the delay is excessive; and

-the respondent will be prejudiced if the extension is granted.

[12] In *Larkman*, the Federal Court of Appeal also examined whether the party had a continuing intention to pursue the application.

[13] The General Division rendered its decision on February 25, 2019. The Claimant filed an application requesting leave to appeal to the Appeal Division on April 16, 2019. The delay involved here is very short and the Commission is unlikely to face any prejudice if I were to grant an extension of time. In his telephone call to the Tribunal on April 8, 2019, the Claimant advised that he would be sending an email explaining why he was late but, insofar as I can determine, the Claimant has yet to provide any explanation for being late.

[14] The fact that the Claimant has not provided a reasonable explanation for the delay would not, on its own, serve as a bar to an extension. In my view, in determining whether it is in the interests of justice to extend the time for filing, generally greater weight should be given to whether there is an arguable case, in the absence of any other special circumstances.

[15] The Claimant argues that there is an arguable case for the following reasons:

(a) The General Division member was biased;

(b) The General Division failed to provide sufficient reasons; and

(c) The General Division refused to exercise its jurisdiction by failing to rule on whether there was a valid contract with the Commission.

[16] This is a relatively low bar. Claimants do not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success.

(a) Is there an arguable case that the General Division member was biased?

[17] The Claimant asserts that the General Division member was necessarily biased because

> She was "hired and paid by the Canadian Government/Canada Corporation, the Canada Corporation being listed on the NYSE, and therefore it is my believe [sic] that they Must be biased, and that these Tribunals are in fact "Star Chambers", and can't possibly be unbiased since these Tribunals are conducted for the express purpose of recouping funds distributed by Employment Insurance, as well as other government agencies of the Canadian Government / Canada Corporation.

[18] The Supreme Court of Canada has outlined the test for bias as follows:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information….[The] test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude.[3]

[19] In *Arthur v. Canada (Attorney General)*,[4] the Federal Court of Appeal held that because allegations of bias challenge the integrity of the tribunal and its members who participate in the impugned decision, they cannot be made lightly. Such allegations cannot rest on an applicant's mere suspicious, conjecture, insinuations, or mere impressions. The allegations must be supported by material evidence demonstrating conduct that derogates from the standard.

[20] The Claimant has made two allegations that would strike at the heart of whether there might be a reasonable apprehension of bias, that: (1) the Social Security Tribunal serves as a "star chamber," and (2) the express purpose of the Tribunal is to recoup funds distributed by the Employment Insurance program.

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[3] *R. v. S. (R.D.)*, [1997] 3 SCR 484.
[4] Dissenting opinion of Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, at p. 394. This test has been adopted and applied since then, e.g. *Arthur v. Canada (Attorney General)*, 2001 FCA 223.

[21] The Claimant alleges that the Tribunal acted as a "Star Chamber," i.e. that it held proceedings in secret and produced an arbitrary result. The Tribunal held a videoconference hearing at which the Claimant was able to fully and fairly present his case. I do not get the sense that the member came to her decision arbitrarily, without any consideration of the evidence or the law. The General Division member considered the Claimant's arguments in arriving at her decision, and addressed only the salient factors.

[22] Under subsection 64(1) of the *Department of Employment and Social Development Act*, the Tribunal is empowered to decide any question of law or fact that is necessary for the disposition of any applications made under the DESDA. There are no provisions in the DESDA or the *Employment Insurance Act* that stipulate or could somehow be interpreted as suggesting that the Tribunal is to recoup funds either on behalf of the Employment Insurance program or for the "Canadian Government/Canada Corporation."

[23] The Claimant has not referred me to any particular statement or action of the General Division member that could or would lead him to conclude or perceive that she was biased. I have reviewed the audio record and find no evidence of any comment or direction from the member that could cause a reasonable person, viewing the matter realistically and practically, and having thought the matter through, to conclude or apprehend that the member was biased or was acting in the government's interest. I see no evidence demonstrating any conduct that derogates from the standard. As such, I am not satisfied that there is an arguable case on this ground.

(b) Is there an arguable case that the General Division failed to provide sufficient reasons?

[24] The Claimant submits that the General Division member failed to explain her decision because he still does not know what commissions he might have earned nor what payment remains outstanding from his employment. The Claimant acknowledges that while his employer may have provided the Commission with a copy of his T4 statement, it has never provided him with any breakdown of the commissions that he earned.

[25] While the employer should have provided the Claimant with a breakdown of any commissions that he might have earned, this matter was irrelevant to the issues before the

General Division. The General Division had to examine whether any income received from the Claimant's employment constituted earnings for the purposes of the *Employment Insurance Act* and, if so, it then had to determine how to allocate those earnings. During the hearing, the General Division also determined that the Claimant sought a write off or reduction of any overpayment. The General Division addressed these issues.

[26] Because the issue of the Claimant's commissions was irrelevant to the issues before the General Division, it was not required to address the fact that the Claimant had yet to receive a breakdown of the commissions that he might have earned from his employment. As the General Division counselled the Claimant during the hearing, any recourse he might have to obtain this information from his former employer lies elsewhere.

(c) Is there an arguable case that the General Division refused to exercise its jurisdiction by failing to rule on whether there was a valid contract with the Commission?

[27] The Claimant argues that the General Division refused to exercise its jurisdiction by failing to rule on whether there was a valid contract with the Commission. He claims that the following factors are relevant to the issue of whether there is a valid contract with the Commission:

- The fact that he did not receive full disclosure about funding of the Employment Insurance program;
- He did not sign a contract with the Commission;
- There was no equal consideration between the parties; and,
- There was no proof of claim;

[28] I can only presume that the Claimant is attempting to attack the validity of the overpayment by arguing that, without a valid contract, the Commission cannot pursue him for repayment.

[29] The General Division explained how the overpayment arose: simply, the Claimant applied for and received Employment Insurance benefits to which he was not entitled. Indeed,

during the proceedings before the General Division, the Claimant acknowledged that an overpayment arose because he received Employment Insurance benefits without declaring that he was also receiving monies from his employer at the same time.5

[30] It is implicit from the General Division member's decision that she in fact considered the issue of the validity of the overpayment. She found the overpayment valid by virtue of the fact that the Claimant had applied for benefits in the first instance and that he had declared that he was truthful in his application for benefits, and then later declared that he was not working when in fact he was. The fact that the Claimant was unaware of the source of funding for the Employment Insurance program, or the fact that there was "no equal consideration" or "no proof of loss" was irrelevant to the issue of the validity of the overpayment.

[31] The Claimant has raised other matters, including what he described as "Common Law Copyright Notice," and the use of "The 'Strawman' or P. M.". The General Division member addressed the Claimant's "Common Law Copyright Notice" finding that it fell beyond her jurisdiction. Frankly, apart from any jurisdictional issues, I find these two particular matters wholly irrelevant to the appeal.

[32] Finally, the Claimant argues that there must be an "injured party," otherwise these proceedings and any rulings are null and void. I do not know what the Claimant means when he says that there must be an "injured party," but assuming if that were true, that there must be an "injured party" to the proceedings, clearly, the Claimant must be the "injured party" in this case, otherwise he would not be seeking an appeal of the General Division's decision and seeking a write-off or reduction of the overpayment.

(d) Summary

[33] I am not satisfied that there is an arguable case or that the appeal has a reasonable chance of success. As such, I find that it does not serve the interests of justice to grant an extension of time for filing the application requesting leave to appeal.

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[5] At approximately 27:58 of the audio recording of the General Division hearing.

Issue 3: If I extend the time for filing the application requesting leave to appeal, is there an arguable case?

[34] I have addressed this issue in the preceding section. If I had granted an extension of time for filing the application requesting leave to appeal, for the same reasons set out above, I would have found that the appeal does not have a reasonable chance of success and, on that basis, would have refused the application requesting leave to appeal.

CONCLUSION

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

Janet Lew
Member, Appeal Division

APPLICANT:	P. M., Self-represented