



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. R. v Canada Employment Insurance Commission*, 2019 SST 493

Tribunal File Number: AD-19-195

BETWEEN:

**S. R.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision and Decision by: Shirley Netten

Date of Decision: May 17, 2019

## **DECISION AND REASONS**

### **DECISION**

[1] An extension of time to request leave to appeal is granted. The application for leave to appeal is also granted, and the appeal is allowed. This matter will be returned to the General Division for reconsideration.

### **OVERVIEW**

[2] S. R. (the Claimant) received employment insurance (EI) benefits between October 2012 and June 2013. In June 2018, following an investigation, the Canada Employment Insurance Commission (Commission) allocated new amounts for the Claimant's earnings during this period. This resulted in an overpayment of benefits.

[3] The Claimant appealed the reconsideration decision about her earnings to the Social Security Tribunal's General Division. She did not attend the hearing scheduled for January 2, 2019. A decision denying the adjournment request was issued on January 7, 2019 (along with a Notice of Hearing for January 2, 2019), and a decision on the merits was issued on January 8, 2019. This matter will be returned to the General Division because the Claimant did not have adequate notice of the hearing or of the refusal of her adjournment request.

### **ISSUES**

[4] The issues are:

- Should the Claimant be given an extension of time to request leave to appeal?
- Is there an arguable case, such that leave to appeal should be granted?
- Did the General Division fail to observe a principle of natural justice by proceeding in the Claimant's absence?
- What is the appropriate remedy?

## ANALYSIS

**Issue 1:** Should the Claimant be given an extension of time to request leave to appeal?

[5] Under the *Department of Employment and Social Development Act* (DESDA), an application for leave to appeal an EI matter must be brought within 30 days after the day the General Division decision was communicated.<sup>1</sup> The Appeal Division can allow an extension of time, as long as it is within one year.<sup>2</sup>

[6] When deciding whether to allow an extension of time, the overriding consideration is that the interests of justice be served.<sup>3</sup> The following four factors are considered:<sup>4</sup>

- a) Has the Claimant shown a continuing intention to pursue her appeal?
- b) Has she provided a reasonable explanation for the delay?
- c) Is there an arguable case on appeal?
- d) Would any other party be prejudiced by the granting of the extension?

[7] In this case, the General Division sent its decision to the Claimant by regular mail on January 9, 2019. The Claimant sent a letter to the Tribunal on January 21, 2019. In that letter, she expressed her disagreement with the General Division's decision to proceed in her absence and asked for the opportunity to attend a hearing. The Tribunal then sent the Claimant a letter on February 7, 2019, explaining that the General Division appeal file was closed and further describing the appeal process to the Appeal Division. The Claimant followed up with an application to the Appeal Division, on March 13, 2019. She noted that she was doing so "within the 30-day time period of being advised that I would need to resubmit my document and completed Application to the Appeal Division." This was three and a half weeks following the statutory appeal deadline.

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<sup>1</sup> DESDA, s 57(1)(a)

<sup>2</sup> DESDA, s 57(2)

<sup>3</sup> *Canada (Attorney General) v Larkman*, 2012 FCA 204

<sup>4</sup> *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883

[8] It is readily apparent from this sequence of events that the Claimant had a continuing intention to pursue an appeal, as well as a reasonable explanation for the delay in properly appealing the General Division decision. There has been no suggestion that the brief extension of time would prejudice the Commission. Finally, as will be seen in the discussion below, the Claimant had an arguable case on appeal. Accordingly, I grant the extension of time to apply for leave to appeal.

**Issues 2 and 3:** Is there an arguable case, such that leave to appeal should be granted? Did the General Division fail to observe a principle of natural justice by proceeding in the Claimant's absence?

[9] The Appeal Division must grant leave (permission) to appeal unless the appeal "has no reasonable chance of success."<sup>5</sup> A reasonable chance of success means having some arguable ground upon which the proposed appeal may succeed.<sup>6</sup> One of the grounds of appeal to the Appeal Division is that the General Division failed to observe a principle of natural justice.<sup>7</sup>

[10] The Commission has conceded that there was a breach of natural justice in this case. The Commission recommends that leave to appeal be granted, the appeal be allowed, and the matter be returned to the General Division for redetermination.

[11] In her initial correspondence, the Claimant disputed the General Division's refusal to grant an adjournment and requested the opportunity to attend a hearing of her appeal as anticipated at the General Division. In response to the Commission's concession, the Claimant provided her availability for a hearing at the General Division. From this, I infer that she agrees with the proposed outcome.

[12] I agree that the Claimant had a reasonable chance of success in her appeal, and consequently I grant leave to appeal. I also agree that the General Division failed to observe a principle of natural justice, and I allow the appeal on this basis.

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<sup>5</sup> DESDA, ss 58(2) and 58(3)

<sup>6</sup> *Osaj v Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41

<sup>7</sup> DESDA, s 58(1)(a)

[13] I accept the following sequence of events, based upon the file documentation:

- The hearing was originally scheduled for November 28, 2018. The General Division granted the Claimant's request that this hearing be rescheduled, due to illness.
- The Tribunal rescheduled the hearing for January 2, 2019. The Notice of Hearing was sent to the Claimant by Xpresspost on November 29, 2018. It was returned "unclaimed" to the Tribunal on December 27, 2018.
- On December 27, 2018, registry staff left the Claimant a voicemail asking for a return call. The telephone conversation log states that the staff member "mentioned the hearing date and ask[ed] her if she would like us to send her the NOH by email, to provide her email address." The Claimant called back the same day and spoke with the call centre. That telephone conversation log says that she "called with the request to postpone the hearing scheduled on January 2, 2019 to the week of February 4 to 8, 2019 due to health reasons." The Claimant did not give an email address, nor is there any indication that this was requested. Registry staff tried calling the Claimant again "to ask her to send her request to adjourn in writing with her reasons", but voicemail was not available then or on December 29, 2018. There was no other communication with the Claimant.
- There is no indication in the record that the Notice of Hearing was re-sent to the Claimant on or after December 27, 2018. In any case, there were only two business days between that date and the hearing date. There is also no indication in the record that the decision to refuse an adjournment was communicated to the Claimant at any time prior to January 7, 2019.

[14] The error here is not that the adjournment request was refused. Since the Claimant had already been granted one adjournment, a second adjournment could only be granted in "exceptional circumstances."<sup>8</sup> Rather, the breach of natural justice arose because the General Division proceeded in the Claimant's absence even though:

- she had not received the Notice of Hearing;

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<sup>8</sup> *Social Security Tribunal Regulations*, s 11(2)

- there was no indication that she had been informed of the time of the hearing on January 2, 2019;
- she had requested a different hearing date within two days of being told of the January 2, 2019 date, which ought to have proceeded as an administrative change of hearing date;<sup>9</sup>
- she appears to have been left with the impression that her request for a later date on December 27, 2018 had been accepted, and there is no file documentation to suggest otherwise;
- during or after this conversation, she was not informed that the hearing would proceed as scheduled if a formal adjournment decision was not made before January 2, 2019; and
- she was not advised of the adjournment refusal until after the hearing date.

[15] In all of these circumstances, the General Division ought not to have proceeded in the Claimant's absence on January 2, 2019. By doing so, the Claimant's right to be heard was compromised.

#### **Issue 4: What is the appropriate remedy?**

[16] The Claimant has not yet had the opportunity to provide evidence, in the form of testimony, to the General Division. Consequently, the record in this matter is not complete, and I cannot provide a decision on the substance of the Claimant's appeal. Rather, this matter must be returned to the General Division for hearing.

[17] The General Division is directed to send its Notice of Hearing to the Claimant by regular mail, as this is her stated preference. The Claimant is asked to telephone the Tribunal to confirm receipt of the Notice of Hearing. The Claimant is advised that one administrative change of date is available to her, if requested within two days of receipt of the Notice of Hearing. The

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<sup>9</sup> An internal Tribunal practice, described at GD7-2 and on the Tribunal's website

Claimant is reminded that a further adjournment request will only be granted in exceptional circumstances.<sup>10</sup>

**CONCLUSION**

[18] An extension of time to request leave to appeal is granted. The application for leave to appeal is also granted, and the appeal is allowed. This matter is referred back to the General Division for reconsideration, with a direction to send the Notice of Hearing to the Claimant by regular mail.

Shirley Netten  
Member, Appeal Division

REPRESENTATIVES:	S. R., Self-represented  I. Thiffault, for the Respondent
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<sup>10</sup> *Social Security Tribunal Regulations* s. 11(2)