



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. M. v Canada Employment Insurance Commission*, 2019 SST 447

Tribunal File Number: AD-19-281

BETWEEN:

C. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: May 14, 2019

DECISION AND REASONS

DECISION

[1] The application for an extension of time to file the application seeking leave to appeal is granted. The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, C. M. (Claimant), applied for and began receiving Employment Insurance regular benefits. He declared that he did not have any earnings for the weeks from February 26, 2017 to June 18, 2017. However, the Respondent, the Canada Employment Insurance Commission (Commission), learned that the Claimant's employer X had paid him wages for these weeks. The Commission allocated these earnings and determined that the Claimant had been overpaid benefits. The Commission concluded that the Claimant had knowingly made false representations to claim benefits and, as such, it imposed a penalty and violation. On reconsideration, it reduced the amount of the penalty. The Claimant appealed the reconsideration decision to the General Division, but it dismissed his appeal.¹ The Claimant is now seeking leave to appeal the General Division's decision.

[3] Firstly, I must decide whether the Claimant's application requesting leave to appeal was filed on time and, secondly, if not, whether I should exercise my discretion and extend the time for the leave to appeal application to be filed. Finally, if I should extend the time to be filed, I must then decide whether the appeal has a reasonable chance of success, i.e. whether there is an arguable case.

[4] The delay involved is very short so I am prepared to grant an extension of time on that basis. However, I am not satisfied that there is an arguable case and therefore am refusing leave to appeal.

ISSUES

[5] The issues are:

¹ See General Division decision dated February 28, 2019, in file number GE-19-514.

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, does the appeal have a reasonable chance of success?

ANALYSIS

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

[6] No. The Claimant did not file his application on time. The facts and my analysis are the same as those in my decision in the Claimant's appeals filed under tribunal file numbers AD-19-279 and AD-19-280.

[7] 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.

[8] The Claimant does not disclose when the General Division's decision was communicated to him. I note, however, that the covering letter under which Social Security Tribunal sent the decision to the Claimant is dated February 28, 2019 and that the Tribunal sent an email dated March 1, 2019 to the Claimant, to which it attached a copy of the General Division's decision. Under section 19 of the *Social Security Tribunal Regulations*, a decision is deemed to have been communicated ten days after the day on which it was mailed. In this case, as the decision may have been sent as late as March 1, 2019—at the same time as the email—it is deemed to have been communicated to him on March 11, 2019. Therefore, the Regulations required the Claimant to have filed an application for leave to appeal by no later than April 10, 2019. According to the date of the Claimant's email to the Tribunal, he filed an application with the Appeal Division on April 15, 2019. He was seven days late in filing an application requesting leave to appeal.

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

[9] Having found that the Claimant was late, should I extend the time for filing?

[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 (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 Claimant has not provided any explanation for the delay, nor any indication of a continuing intention. However, the Commission is unlikely to face any prejudice if I were to grant an extension of time and the delay in filing the application is short. The fact that the delay involved is a mere week, if that, strongly militates in favour of an extension. On top of that, the fact that the Claimant has not provided a reasonable explanation for his delay generally would not, on its own, serve as a bar to an extension.

[14] In determining whether it is in the interests of justice to extend the time for filing, generally greater weight is given to whether there is an arguable case, in the absence of any other

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

special circumstances. However, given that the delay involved here is relatively short, I am prepared to grant an extension of time and leave my examination of an arguable case to the application for leave to appeal.

Issue 3: Does the appeal have a reasonable chance of success?

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

- (i) the General Division member failed to observe a principle of natural justice because he did not provide him with a full and fair opportunity to present his case;
- (ii) the General Division erred in law because it failed to consider whether the reasons he left his employment constituted just cause;
- (iii) the General Division based its decision on an erroneous finding of fact that it made without regard to the material before it by ignoring why he left his employment.

[16] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law, and vice versa.³ Either way, for there to be a reasonable chance of success, the grounds of appeal must be based on subsection 58(1) of the DESDA. The subsection lists the grounds of appeal that are available for there to be a reasonable chance of success. They are limited to the following:

- (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.

³ *Fancy v. Canada (Attorney General)*, 2010 FC 63.

[17] Claimants do not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based on a reviewable error.

[18] The Claimant argues that the General Division based its decision on an erroneous finding of fact by ignoring the evidence as to why he left his employment, and further, that it then erred in law by failing to consider whether these considerations constituted just cause. However, these arguments relate to his employment with another employer—X (doing business as)—rather than with Cavendish Farms Corporation. The Claimant’s arguments regarding his employment with X are not relevant because the General Division’s decision related solely to his employment with. The Social Security Tribunal pointed this out to the Claimant in its letter dated April 25, 2019.

[19] The Tribunal also noted that the Claimant’s application for leave did not appear to refer to the penalty and violation issues that the General Division had decided. However, the Tribunal noted that the Claimant argued that there were grounds for appeal, so it asked him to provide details and a response by May 6, 2019. The Claimant has not provided any response.

[20] As the letter from the Tribunal pointed out, it is insufficient to simply argue that the General Division failed to observe a principle of natural justice without providing any supporting evidence. The principle of natural justice refers to the fundamental rules of procedure that apply in judicial or quasi-judicial environments. The principle exists to ensure that all parties receive adequate notice of any proceedings, that all parties have a full opportunity to present their case, and that proceedings are fair and free of bias or the reasonable apprehension of bias. It relates to issues of procedural fairness. There is no suggestion from the Claimant that he received inadequate notice of the hearing, that the General Division member deprived him of a fair hearing, or that there was any apprehension of bias. And, after having reviewed the evidence, including the audio recording of the General Division hearing, I am unable to see any evidence where the General Division might have deprived the Claimant of an opportunity to fully present his case or any evidence of a reasonable apprehension of bias. Similarly, I do not see any indication where the General Division might arguably have misconstrued or overlooked any of the evidence, or where it might have erred in law.

[21] I am not satisfied that the appeal has a reasonable chance of success and, as such, I am refusing leave to appeal.

CONCLUSION

[22] The extension of time to file an application for leave to appeal is granted but as I am not satisfied that there is an arguable case, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

APPLICANT:	C. G., Self-represented
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