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

Citation: *S. M. v Canada Employment Insurance Commission*, 2019 SST 544

Tribunal File Number: AD-19-362

BETWEEN:

S. 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: June 3, 2019

DECISION AND REASONS

DECISION

[1] The request for an extension of time is denied and the application for leave to appeal is therefore refused.

OVERVIEW

[2] The Applicant, S. M. (Claimant), injured her knee in a workplace injury on September 12, 2016.[1] She remained off work to January 2017 before commencing a graduated return to work. She resumed full-time duties in May 2017. She pursued workers' compensation benefits in relation to a back injury, but WorkSafe BC denied her claim. She calculates that she lost close to 500 hours in salary. In August 2018, she applied for Employment Insurance sickness benefits. The Respondent, the Canada Employment Insurance Commission (Commission), determined that she did not have any hours of insurable employment between August 27, 2017 and August 25, 2018, and therefore denied her claim.[2] On reconsideration, the Commission maintained its earlier decision and found that a benefit period had not been established and that she was not entitled to an antedate.[3] The Claimant appealed the Commission's reconsideration decision to the General Division, but it dismissed the appeal, having found that the Claimant did not have good cause for the delay. The Claimant is now seeking leave to appeal the General Division's decision.

[3] First off, 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 am not satisfied that there is an arguable case, and therefore the request for an extension of time to file the application for leave to appeal is denied.

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[1] The hearing file before the General Division suggests that the Claimant's injury occurred on September 2016, but the Claimant's application requesting leave to appeal indicates that the injury occurred on July 20, 2016. See AD1-6. However, I do not find that anything turns on this.
[2] Commission's letter dated September 19, 2018, at GD3-20 to GD3-21.
[3] Commission's reconsideration dated November 5, 2018, at GD3-32 to GD3-33.

ISSUES

[4] The issues are:

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

[5] No. The Claimant did not file her application on time.

[6] 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.

[7] The Claimant does not disclose in her application when the General Division's decision was communicated to her. I note, however, that the covering letter under which Social Security Tribunal sent the decision to the Claimant is dated January 21, 2019 and that the Tribunal sent an email dated January 21, 2019 to the Claimant, enclosing a copy of the decision. Under subsection 19(1)(c) of the *Social Security Tribunal Regulations*, a decision is deemed to have been communicated the next business day after the day on which it was transmitted, if sent by email or other electronic means. In this case, as the Social Security Tribunal sent the decision on January 21, 2019, it is deemed to have been communicated to her on January 22, 2019. Therefore, the Claimant was required to have filed an application for leave to appeal by no later than February 21, 2019. As the application is date-stamped received on May 23, 2019, the Claimant was late when she filed her application requesting leave to appeal.

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

[8] 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.

[9] 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.[4] In both *X (Re)* and *Canada (Attorney General) v. Larkman*, the Federal Court of Appeal identified the relevant factors to consider:

- 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.

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

[11] The Claimant has not provided any explanation for the delay, nor any indication of a continuing intention. The delay involved here is little more than three months, but the Commission is unlikely to face any prejudice if I were to grant an extension of time. The fact that the Claimant has not provided a reasonable explanation for any delay generally would not, on its own, serve as a bar to an extension. 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 special circumstances. I will focus on whether there is an arguable case.

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

[12] The Claimant argues that there is an arguable case because the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it. In particular, she submits that the General Division erred in finding that she did not make any enquiries about her entitlement to benefits under the *Employment Insurance Act*.

[13] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law, and *vice versa*.[5] 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 only grounds of appeal that are available for there to be a reasonable chance of success. They are as follows:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[14] 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.

[15] The General Division found that the Claimant did not take reasonably prompt steps to understand her obligations under the *Employment Insurance Act* and that, as such, she did not prove that she had good cause for the delay in applying for Employment Insurance sickness benefits.

[16] The Claimant denies that she did not take reasonably prompt steps to understand her rights. She argues that the General Division overlooked some of the evidence:

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[5] *Fancy v. Canada (Attorney General)*, 2010 FC 63.

- She had worked for 20 years as a chartered professional in human resources as a human resources manager for many large organizations where she instructed employees on how to access records of employment, go to the Service Canada website to access their accounts and apply for employment insurance or for sickness benefits;

- She had accessed the Service Canada website to obtain her own record of employment and to get information regarding Employment Insurance benefits. In August 2018, she also accessed the website to apply for sickness benefits; and,

- In July 2018, she made in-person enquiries with Service Canada agents, who advised her that all forms to make a late claim were online. An Employment Insurance case manager, who contacted her, confirmed this information with her;

[17] In fact, the General Division referred to some of this evidence. At paragraphs 15 and 17, the General Division noted that the Claimant worked as a human resources manager and that she was responsible for issuing records of employment. The General Division found that she was therefore familiar with the employment insurance scheme. It is also evident from the General Division's decision the Claimant applied for online sickness benefits by accessing the Service Canada website in August 2018.[6] Hence, I am not satisfied that there is an arguable case that the General Division overlooked this evidence.

[18] The General Division did not refer to the fact that in July 2018, the Claimant had made enquiries with Service Canada agents, who apparently advised that she could find forms online to make a late claim, or that she later confirmed this information with a case manager. However, there is no documentary evidence in the hearing file before the General Division to show that the Claimant had made enquiries with Service Canada agents in July 2018. I listened to the audio recording before the General Division, but there is no oral evidence either that the Claimant made enquiries in July 2018. Because the General Division did not have this evidence before it, I am not satisfied that there is an arguable case that the General Division overlooked this evidence.

[6] In her application requesting leave to appeal, the Claimant states that she applied for Employment Insurance benefits in September 2018, but the hearing file suggests that she applied on August 31, 2018. See GD3-14.

[19] Even if this evidence had been before the General Division, more than 1.5 years had passed since the Claimant last worked in September 2016, following a workplace injury. The fact that the Claimant spoke with an agent in July 2018 still would not explain what steps, if any, she took between when she last worked in September 2016 and July 2018. As the General Division noted, claimants must show that they had good cause throughout the entire period of the delay.

[20] The Claimant also argues that the General Division erred in finding that she had stated that she was unaware that she was entitled to Employment Insurance benefits. She claims that, in fact, she was unaware whether WorkSafe BC would pay her any benefits and that because of this, she waited for a decision from WorkSafe BC before applying for Employment Insurance benefits, rather than risk "double dipping."

[21] However, her claims are inconsistent with the documentary evidence. For instance, phone log notes indicate that the Claimant stated that she was unaware that she could have applied for employment Insurance sickness benefits while she was receiving worker's compensation benefits.[7]

[22] However, even if the General Division had erred in finding that she was unaware of her entitlement to Employment Insurance benefits, this would have been of little assistance to the Claimant's appeal. In other words, if she had been aware that she was entitled to benefits, this would not provided good cause for her delay in applying for benefits.

[23] Finally, the Claimant is asking me to reconsider the General Division's decision and allow her request for an antedate. However, subsection 58(1) of the DESDA does not allow for a reassessment of the evidence or a rehearing of the matter. Accordingly, I am not satisfied that the appeal has a reasonable chance of success.

[24] Because I am not satisfied that there is an arguable case or that the appeal has a reasonable chance of success, I find that it lies against the interests of justice to extend the time for filing the application for leave to appeal.

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

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[7] Phone log notes at GD3-18, GD3-29, and GD3-31.

[25] For the reasons that I have set out above, I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing leave to appeal.

CONCLUSION

[26] The request for an extension of time is denied.

[27] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

APPLICANT:	S. M., Self-represented