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

Citation: *S. K. v Canada Employment Insurance Commission*, 2019 SST 542

Tribunal File Number: AD-19-284

BETWEEN:

S. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Jude Samson

Date of Decision: June 5, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] S. K. is the Claimant in this case. She works seasonally and often applies for Employment Insurance (EI) regular benefits during the summer months. In 2016, however, she withdrew her initial claim for EI regular benefits just a few days after she had submitted it. She thought that she had secured a new job, but the new job never materialized.

[3] Though the Claimant might have been eligible for EI regular benefits during the summer of 2016, she did not request them again until December 2017, which was followed by the filing of a formal claim in June 2018. Relying on the terms of the *Employment Insurance Act* (EI Act), the Claimant asked that her June 2018 claim be antedated to June 26, 2016, when she stopped working for that summer.

[4] However, the Canada Employment Insurance Commission (Commission) denied the Claimant's request for an antedate, saying that she had failed to show good cause for the delay throughout the entire period from June 2016 to June 2018. The Claimant challenged the Commission's decision, but the Commission maintained it on reconsideration. The Claimant then appealed the Commission's reconsideration decision to the Tribunal's General Division, but the General Division dismissed her appeal.

[5] The Claimant now wants to appeal the General Division decision to the Tribunal's Appeal Division, but she has an initial hurdle to overcome before the file can move forward. In particular, the Claimant's Application to the Appeal Division was filed after the 30-day deadline, so she needs an extension of time to file her application.

[6] Unfortunately for the Claimant, I have decided that I must refuse her request for an extension of time. These are the reasons for my decision.

ISSUES

[7] In reaching this decision, I focused on the following issues:

a) Was the Claimant's Application to the Appeal Division filed late?

b) Should the Claimant be given an extension of time to file her application?

ANALYSIS

Issue 1: Was the Claimant's Application to the Appeal Division filed late?

[8] Yes, the Claimant was late filing her Application to the Appeal Division.

[9] Applications to the Appeal Division are due within 30 days of when claimants receive the General Division decision, but the Appeal Division can allow extensions of time if the application is filed less than a year late.[1]

[10] In this case, the General Division decision was sent to the Claimant by email on December 6, 2018. As a result, her Application to the Appeal Division was due on January 7, 2019, but the Tribunal received it on April 16, 2019, meaning that it was over three months late.

[11] Overall, therefore, the Claimant missed the deadline for filing her Application to the Appeal Division, but an extension of time is possible in her case.

Issue 2: Should the Claimant be given an extension of time to file her application?

[12] No, the Claimant has not met the legal test for obtaining an extension of time.

[13] When deciding this issue, I weighed the following four factors:[2]

a) Has the Claimant shown a continuing intention to pursue her appeal?

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[1] *Department of Employment and Social Development Act*, ss 57(1)(a) and 57(2).
[2] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

b) Has she provided a reasonable explanation for the delay?

c) Would any other party be prejudiced by the granting of the extension?

d) Is there an arguable case on appeal?

[14] The Claimant responded to these factors in her Application to the Appeal Division.[3] Not all four factors need to be met; the overriding consideration is that the interests of justice be served.[4]

A continuing intention to pursue the appeal

[15] Tribunal records show that, on December 17, 2018, and on April 11, 2019, the Claimant or her representative told Tribunal staff that she was planning to appeal the General Division decision. In between those dates, however, she brought an application to rescind or amend the General Division decision.

[16] It is unclear to me, therefore, whether the Claimant maintained her intention of pursuing the appeal throughout the entire relevant period. For example, her intention of pursuing the appeal might have been interrupted while she brought her application to rescind or amend the General Division decision. For present purposes, however, I am prepared to accept that this factor has been met.

A reasonable explanation for the delay

[17] In the letter that accompanied the General Division decision, the Tribunal informed the Claimant that she had 30 days to appeal the decision. Nevertheless, the Claimant explained that she delayed filing her Application to the Appeal Division because she first wanted a decision on her application to rescind or amend the General Division decision.

[18] The Claimant's application to rescind or amend the General Division decision should not have prevented her from filing her Application to the Appeal Division in a timely way. Indeed,

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[3] AD1-4.
[4] *Canada (Attorney General) v Larkman*, 2012 FCA 204.

she could have filed both and asked for this file to be put on hold while the General Division decided the other (which is the Tribunal's usual practice in any case).

[19] As a result, I conclude that this factor has not been met.

Prejudice to another party

[20] Given the Commission's resources and the availability of relevant documents, there is no obvious reason why the Commission's ability to respond to the appeal would be unduly affected by allowing the extension of time.

Arguable case

[21] I find that the Claimant does not have an arguable case on appeal. To explain this conclusion, I first have to lay out a few more background facts.

[22] The Claimant applied for EI regular benefits in the summers of 2015, 2016, and 2017 (and possibly others). As mentioned above, however, the Claimant withdrew her 2016 initial claim for EI regular benefits just a few days after she had submitted it. She thought that she had secured a new job, but it fell through. As a result, the Claimant was unemployed during the summer of 2016, but never received EI benefits for that period.

[23] In May 2017, however, the Commission sent the Claimant a notice saying that she would have to repay a portion of the EI benefits that she had received in the summer of 2015. This motivated the Claimant to obtain, on May 25, 2017, a detailed history of the EI benefits that she had received. When reviewing this statement, the Claimant realized that she had not received EI benefits during the summer of 2016.

[24] The Claimant accepted responsibility for the 2015 overpayment, but provided an explanation for her mistake. The Commission nevertheless assessed a penalty against her. On December 4, 2017, the Claimant asked the Commission to reconsider its penalty decision. At the same time, she noted the issue of missed benefits from the summer of 2016 and asked the Commission to use those benefits to reduce the amount of her overpayment. The Claimant continued to press this point, though the Commission mostly ignored it.

[25] The Claimant appealed the Commission's decision to the Tribunal's General Division.[5] The Claimant was successful on the penalty issue, but the General Division found that it had no jurisdiction over the question of the Claimant's benefits for the summer of 2016, because the Commission had not decided that issue.[6]

[26] The Claimant telephoned the Commission to ask how she could get a decision concerning potentially missed benefits from the summer of 2016. She was told to submit a new initial claim for EI regular benefits and request that it be antedated to June 26, 2016, which is what she did on June 7, 2018.[7]

[27] Nevertheless, the Commission denied the Claimant's request for an antedate, saying that she had failed to establish "good cause" for the delay during the entire period from June 2016, to June 2018.[8] The Commission maintained that decision on reconsideration. On December 5, 2018, the General Division dismissed the Claimant's appeal of the Commission's reconsideration decision.[9] This is the issue and the decision that the Claimant now wants to appeal to the Appeal Division.

[28] The Claimant's request for an antedate is governed by section 10(4) of the EI Act, which says this:

> **Late initial claims**
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> **10(4)** An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.

[29] In its decision, therefore, the General Division identified the relevant period as being from June 26, 2016, to June 7, 2018. In addition, the Claimant was obliged to show she had acted

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[5] Tribunal File Number GE-18-606).
[6] The General Division decision in file GE-18-606 can be found at pages GD3-44 to 53.
[7] GD3-26 to 41.
[8] GD3-42.
[9] Tribunal File Number GE-18-2946.

as a reasonable and prudent person would have done in similar circumstances throughout this entire period.[10]

[30] For the purpose of its analysis, the General Division divided the relevant period into three sub-periods:

a) from June 26, 2016, the Claimant's last day of work, until May 25, 2017, when the Claimant received a statement of benefit payments and realized that she had not received EI benefits during the summer of 2016;

b) from May 25, 2017, until December 4, 2017, when she brought this issue to the attention of the Commission; and

c) from December 4, 2017, until June 7, 2018, when she submitted her claim for benefits.

[31] In the end, the General Division concluded that the Claimant had shown good cause for the delay in the third sub-period, but not in the first two. As a result, it was unable to antedate her claim.

[32] To successfully appeal the General Division decision, the Claimant must now establish that the General Division committed one or more of the recognized errors (grounds of appeal) set out in section 58(1) of the *Department of Employment and Social Development Act*.

[33] In her Application to the Appeal Division, the Claimant alleges that the General Division decision contains an error of law. In particular, she argues that the General Division ignored the reasonable steps that she took to try and resolve this issue in the period leading up to the filing of her claim in June 2018. She also argues that the General Division wrongly identified the relevant period.

[34] In my view, the arguments put forward by the Claimant do not give rise to an arguable case on appeal. In particular, the relevant period identified by the General Division—from June 26, 2016, to June 7, 2018—was obviously correct based on section 10(4) of the EI Act.

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[10] General Division decision at para 21; *Canada (Attorney General) v Burke*, 2012 FCA 139 at paras 5 and 11.

Indeed, the Claimant has not pointed to any legal authority to support the use of some other period.

[35] In addition, all of the letters, telephone conversations, steps, and other actions that the Claimant alleges were ignored by the General Division appear to have occurred during the third sub-period. However, the General Division agreed that the Claimant had acted reasonably during that sub-period. The challenge for the Claimant concerns the reasonableness of her actions during the first two sub-periods, yet none of the Claimant's arguments on appeal are targeted at those sub-periods.

[36] While I have concluded that the arguments the Claimant is advancing do not give rise to an arguable case on appeal, I am nevertheless mindful of Federal Court decisions in which the Appeal Division has been warned against reviewing applications to the Appeal Division in an overly strict way. Instead, the Appeal Division should review the underlying record to determine whether the General Division misinterpreted or failed to properly consider any of the evidence.[11]

[37] After reviewing the documentary record and examining the decision under appeal, I am satisfied that the General Division neither misinterpreted nor failed to properly consider any relevant evidence.

[38] For all of these reasons, I find that the Claimant does not have an arguable case on appeal.

Conclusion on the extension of time

[39] Though the factors above are somewhat balanced, I have also made an overall assessment of what the interests of justice might require. In this respect, I acknowledge that the refusal to grant an extension of time means that the Claimant's appeal ends here, but I must weigh that against the extent to which the interests of justice would be served by allowing an appeal to proceed even though it has no reasonable chance of success.

[11] *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.

[40] I am aware of cases in which the courts have given particular weight to the arguable case factor, and I find that that factor is entitled to significant weight in this case too.[12]

[41] Having considered the four factors above and the interests of justice, I have decided that the extension of time needed for the Claimant to file her Application to the Appeal Division should be refused.

CONCLUSION

[42] Although I sympathize with the Claimant's circumstances, I have concluded that I cannot allow the extension of time that she needs for her file to move forward.

[43] The Claimant's request for an extension of time is refused.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	X, for the Applicant

[12] *McCann v Canada (Attorney General)*, 2016 FC 878; *Maqsood v Canada (Attorney General)*, 2011 FCA 309.