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

Citation: *MV v Canada Employment Insurance Commission*, 2019 SST 1752

Tribunal File Number: GE-19-1241

BETWEEN:

M. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Maria Marchese

HEARD ON: May 14, 2019

DATE OF DECISION: June 12, 2019

Canada

DECISION

[1] The appeal is dismissed. An extension of time to appeal is not allowed because there is no arguable case.

OVERVIEW

[2] The Appellant applied for employment insurance sickness benefits on February 16, 2017 after stopping work due to illness on December 9, 2016. She received sickness benefits from the week of February 12, 2017 to the week of April 2, 2017. After having begun to receive sickness benefits, the Appellant began receiving group wage loss long-term disability payments retroactive to January 13, 2017 in the monthly gross amount of $4,803.00. The Canada Employment Insurance Commission (Commission) determined that the long-term disability benefit payments were considered earnings according to section 35 of the *Employment Insurance Regulations* (E.I. Regulations) and that they would be allocated to the Appellant's claim, pursuant to section 36 of the E.I. Regulations. The long-term disability benefits were allocated to the week of January 13, 2017 through to the week of April 2, 2017 at a rate of $1,108.00 per week. Upon reconsideration, the Commission antedated (backdated) the Appellant's initial claim so that her benefit period began the week of December 18, 2016. This allocation resulted in an overpayment of $4,344.00.

[3] The Commission issued an initial decision on May 17, 2017 advising the Appellant that her wage loss insurance payments are considered earnings and will affect her employment insurance benefits and that an overpayment was created. On June 7, 2017 the Appellant requested reconsideration under s. 112(1) of the *Employment Insurance Act* (the E.I. Act). On June 27, 2017 the Commission spoke with the Appellant regarding her reconsideration request and advised the Appellant that it was maintaining its initial decision. The Appellant appealed this reconsideration decision to the General Division - Employment Insurance Section of the Social Security Tribunal (Tribunal) on July 3, 2018, and a hearing was held on September 4, 2018.

[4] On September 4, 2018 the General Division determined that the Appellant had filed her appeal more than one year after the day on which the reconsideration decision was

communicated to the Appellant, and an extension of time to allow her to continue with the appeal could not be granted pursuant to s. 52(2) of the *Department of Employment and Social Development Act* (DESD Act), which states that in no case may an appeal be brought more than one year after the day on which the reconsideration decision is communicated to the appellant.

[5] The Appellant appealed the General Division's decision to the Tribunal's Appeal Division. The Appeal Division allowed the Appellant's appeal and returned the matter back to the General Division for redetermination.

ISSUES

[6] Issue 1: Was the Appellant's appeal to the General Division filed within the 365-day limit set out in s. 52(2) of the DESD Act?

[7] Issue 2: If so, is an extension of time for the appeal to be brought pursuant to s. 52(2) of the DESD Act in order?

ANALYSIS

[8] Section 113 of the E.I. Act states that a party who is dissatisfied with a decision of the Commission made under section 112 (that is, a reconsideration decision) may appeal the decision to the Tribunal.

[9] Subsection 52(1) of the DESD Act sets out the time limit for appealing to the Tribunal. It states that an EI appeal must be brought to the Tribunal within 30 days after the date on which the decision was communicated to the appellant. Section 52(2) of the DESD Act states that the Tribunal may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

Issue 1: Was the Appellant's appeal to the General Division filed within the 365-day limit set out in s. 52(2) of the DESD Act?

[10] The Tribunal finds that the Appellant's appeal was filed within 365 days from the date the Commission's reconsideration decision was communicated to her.

[11] The Commission submitted that it verbally communicated its reconsideration decision to the Appellant on June 27, 2017 and provided its Supplementary Record of Claim (GD3-36) which states that the Commission spoke to the Appellant on that date and advised her that it was maintaining its initial decision regarding the allocation of earnings, but that her overpayment amount would be reduced. On June 28, 2017 the Commission issued its reconsideration decision letter regarding the earnings and allocation. The Commission submits that, while the General Division's first decision stated that the Appellant did not dispute being verbally advised of the Commission's reconsideration decision on June 27, 2017, it is not clear exactly when the Appellant was informed about the reconsideration decision or her appeal rights, given the Appellant's statement on her notice of appeal to the Tribunal that she could not recall when she received the reconsideration decision letter.

[12] The Appellant filed her notice of appeal to the Tribunal on July 3, 2018, stating that she did not remember when she received the Commission's reconsideration decision. The Appellant confirmed that she has lived at the address on file for the last 19 years. The Appellant also stated that although she recalled receiving the June 28, 2017 reconsideration decision letter some time in July 2017, she "had no recollection of the date she received it" although she believes she may have received the reconsideration decision about one week after her conversation with the Commission.

[13] The Federal Court of Appeal in *Atlantic Coast Scallop Fishermen's Assn. v. Canada (Minister of Fisheries & Oceans)*, A-163-95 and A-162-95, considered the meaning of "communicated" in the context of s. 18.1(2) of the *Federal Courts Act* and confirmed that the burden to show a decision is communicated rests with the decision-maker. While the court was not considering the DESD Act, I am guided by the Federal Court of Appeal in *Atlantic Coast* and find that the burden of proving that the reconsideration decision was communicated to the Appellant rests with the Commission.

[14] The Tribunal agrees with the Commission's submission that there is no clear evidence of when the reconsideration decision was communicated to the Appellant. The call log from the June 27, 2017 discussion notes that the allocation of earnings was being maintained, but that the overpayment would be changed, but did not say how. Because this part of the decision remained

to be determined, I find that the complete decision was not communicated to the Appellant during that call and therefore communication did not happen on that day. Rather, the decision was communicated when the Appellant received the reconsideration decision letter.

[15] There is no clear evidence of when the Appellant received the reconsideration decision letter. Accordingly, the Tribunal finds that the reconsideration decision was received by the Appellant in the ordinary course of mail delivery, and this is when it was communicated. In deciding how many days it takes for something to be received in the ordinary course of mail delivery, the Tribunal looked to s. 19 of the *Social Security Tribunal Regulations* (the SST Regulations) for guidance. While not bound by s. 19 of the SST Regulations because it does not apply to documents sent by the Commission, the Tribunal is guided by that section, which provides that documents sent by ordinary mail are deemed to be received 10 days after the day on which they are mailed to the party. Using the 10-day period as a guideline, the Tribunal finds that the Commission's June 28, 2017 reconsideration decision was communicated to the Appellant on July 8, 2017. This also aligns with the Appellant's recollection of receiving the reconsideration decision letter about a week after her conversation with the Commission. The Appellant filed her appeal to the Tribunal on July 3, 2018 and, therefore, the Tribunal finds that the Appellant filed her appeal within the 365-day timeframe set out in s. 52(2) of the DESD Act.

Issue 2: Is an extension of time for the appeal to be brought pursuant to s. 52(2) of the DESD Act in order?

[16] As noted above, an appellant has 30 days to file an appeal of an EI decision with the Tribunal. For appeals filed after 30 days, the Tribunal has to decide whether to grant an extension of time. The Tribunal has found that the Appellant filed her appeal within the outer deadline of one year, but it must still decide whether to allow the extension of time needed for appeals filed late (that is, after 30 days). There is no dispute that the appeal was filed late.

[17] The courts have held that in deciding whether to allow further time to appeal, four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883 must be considered: whether there was a continuing intention to pursue the appeal; does the matter disclose an arguable case; whether there was a reasonable explanation for the delay; and is there prejudice to the Commission in allowing the extension of time to appeal. The weight to be given

to each of the *Gattellaro* factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served *(Canada (Attorney General) v. Larkman*, 2012 FCA 204; see also *Jama v. Canada (Attorney General)*, 2016 FC 1290, which confirmed this approach in considering whether an extension of time should be granted).

Continuing intention to pursue the appeal

[18] The Tribunal finds that the Appellant did not have a continuing intention to pursue the appeal. At the hearing, the Appellant testified that she took no steps to pursue her appeal from January 13, 2017 to June 16, 2018 because she was already being paid long-term disability (LTD) benefits and did not need employment insurance benefits. The Tribunal finds that the Appellant did not demonstrate a continuing intention to pursue an appeal prior to appealing to the Tribunal on July 3, 2018.

Reasonable explanation for the delay in appealing

[19] The Tribunal finds that the Appellant had a reasonable explanation for the delay in appealing to the Tribunal. At the hearing, the Appellant testified that she delayed in filing her appeal with the Tribunal because she did not want to risk losing her LTD benefits or having another overpayment created in her employment insurance claim. The Appellant was in receipt of LTD benefits from January 2017 to June 2018 and she understood that she could not collect employment insurance benefits while receiving LTD benefits. The Appellant became aware of this fact when, after beginning to receive LTD benefits, the Commission advised her that an overpayment was created in her claim because she could not collect employment insurance benefits while receiving LTD benefits. In June of 2018 the Appellant's LTD benefits were discontinued and, since the Appellant had no other income, she called Service Canada in June 2018 to see if there was any chance of receiving employment insurance sick benefits since she was still ill. The Tribunal finds that it was reasonable for the Appellant to wait until after her LTD benefits had ceased before appealing as she knew that she would not be entitled to employment insurance benefits while already collecting LTD benefits.

Is there prejudice to the Commission in allowing the extension of time to appeal?

[20] The Tribunal finds that the Commission would not be prejudiced by an extension of time to appeal. While the reconsideration decision dates back to July 2017, many documents have been received by the Commission given that this appeal went to the Appeal Division for the leave to appeal and appeal processes, and the Commission has been involved and has all relevant documents.

Does the matter disclose an arguable case?

[21] The Tribunal finds that the matter does not disclose an arguable case. The Appellant wants a decision on whether she is entitled to sickness benefits. However, the decision that she is appealing to the Tribunal relates to earnings and allocation, which is a decision that she accepts. There is no arguable case because the Tribunal does not have jurisdiction to decide the issue the Appellant wants decided: whether she may be paid sickness benefits.

[22] At the hearing the Appellant testified that after her LTD benefits stopped she was still ill and without benefits so she decided to contact Service Canada in June of 2018 to discuss the possibility of reapplying for sick benefits, commencing after her LTD benefits ended. The Appellant stated that the Service Canada agent suggested she complete and mail the reconsideration form to the Commission. The Appellant testified that when she completed the reconsideration request it was never intended to be a request for the Commission to reconsider the overpayment or earnings allocation decision, as those issues had been decided long ago and she had no interest in reopening those issues. According to the Appellant, the earnings allocation and overpayment decision was a “done thing” because she had already been provided with an explanation as to why she was not entitled to employment insurance sick benefits while receiving LTD benefits. The Appellant stated that her point in submitting a reconsideration was to ask the Commission to make a determination about employment insurance sick benefits going forward, and not to re-visit its decision on the earnings allocation and overpayment issues.

[23] In its submissions to the Tribunal, the Commission noted that it appears the Appellant is disputing the fact that she is not entitled to receive sickness benefits and is not disputing the allocation of earnings. The Commission submitted that, while its decision on allocation of

earnings is not under appeal, the proper recourse for the Appellant would be to communicate with the Commission to verify her entitlement to sickness benefits following the cessation of her LTD benefits.

[24] The Tribunal finds that the Appellant does not have an arguable case because her appeal does not stand a reasonable chance of success because the reconsideration decision under appeal pertains to the allocation of the Appellant's LTD benefits, which the Appellant is not appealing. The Tribunal finds that the Appellant's request for "reconsideration" was not with reference to the Commission's June 28, 2017 decision but, rather, the Appellant was requesting that the Commission decide whether she would be entitled to sickness benefits following the end of her LTD benefits. The Tribunal finds that the Appellant was very clear and credible in her testimony as to what she was requesting.

[25] The Tribunal's jurisdiction to decide an issue comes from the reconsideration letter. The Appellant's reconsideration letter is on earnings and allocation. That is the only issue that the Tribunal has the jurisdiction to decide, but that is not the decision that the Appellant wants to appeal. There is no reconsideration decision on whether the Appellant is entitled to sickness benefits after the end of her LTD benefits. Because there is no reconsideration decision on this issue, the Tribunal cannot decide the issue. Accordingly, because the Tribunal does not have jurisdiction to decide what the Appellant wants to appeal, the Tribunal finds that there is no arguable case therefore the appeal has no reasonable chance of success. Although the Appellant contacted Service Canada for guidance after her LTD benefits ceased, the Tribunal finds that Service Canada misunderstood the Appellant's intention – the Appellant was not looking for a reconsideration of the earnings allocation decision but was, instead, seeking assistance regarding the possibility of a review of her entitlement to sickness benefits going forward.

[26] While the Appellant had a reasonable explanation for the delay in appealing and the Commission would not be prejudiced if the time to appeal was extended, the Tribunal puts little weight to these factors and places more weight on the fact that there is no arguable case. The issue that the Tribunal has jurisdiction to decide relates to the allocation of earnings, however, that is not what the Appellant is appealing, therefore there is no arguable case and the appeal has no reasonable chance of success. The overarching consideration that the Tribunal must decide

when considering an extension of time to appeal is whether the interests of justice are served by allowing an extension. It is not in the interests of justice to allow an extension of time to hear an appeal that is bound to fail. Therefore, the request for an extension of time to appeal is dismissed.

[27] The Appellant was requesting that the Commission consider her entitlement to sickness benefits from June 2018 onward. In its submissions, the Commission noted that issue was not under appeal and the proper approach for the Appellant would be to communicate with the Commission to verify her entitlement to such benefits following the cessation of her LTD benefits. The Appellant may therefore want to contact the Commission regarding her request for sickness benefits from June 2018 onward.

CONCLUSION

[28] The appeal is dismissed.

Maria Marchese

Member, General Division - Employment Insurance Section

HEARD ON:	May 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. V., Appellant