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

Citation: *J. J. v Canada Employment Insurance Commission and D. P.*, 2019 SST 703

Tribunal File Number: AD-19-323

BETWEEN:

J. J.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

D. P.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Stephen Bergen

Date of Decision: August 7, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, J. J. (Claimant) applied for Employment Benefits after she left her employment. She initially claimed that she lost her employment due to a shortage of work, but the employer submitted an ROE stating that the Claimant had quit. The Respondent, the Canada Employment Insurance Commission (Commission) investigated the claim, but was only able to contact the employer. The employer told the Commission that the Claimant quit because the employer confronted the Claimant for having paid herself out of the employer's funds for taking a sick leave when the Claimant was not entitled to sick pay. Based on the employer's information, the Commission determined that the Claimant had voluntarily left her employment without just cause. The Claimant asked for a reconsideration, asserting that she quit due to emotional and physical abuse. The Commission changed its decision to accept that the Claimant had just cause for leaving her employment.

[3] The employer appealed the reconsideration decision to the General Division of the Social Security Tribunal. The General Division allowed the appeal, and found that the Claimant should be disqualified from receiving benefits from the date that she initially established her benefit period.

[4] The Claimant now seeks leave to appeal to the Appeal Division. Unfortunately, her appeal is late and she has not satisfied me that it is in the interests of justice to grant the extension of time and allow the appeal to proceed. The Claimant has not established that she had a continuing intention to pursue the application or satisfied me that she has a reasonable explanation for the lateness of her appeal. In addition, the Claimant has not raised an arguable case that might be successful on appeal.

PRELIMINARY MATTERS

Was the application for leave to appeal filed late?

[5] According to section 57(1) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made within 30 days after the day on which the General Division decision is communicated to a party.

[6] There is no information on file that would confirm the exact date that the decision was actually communicated to the Claimant. The Claimant did not state the date that she received a copy of the General Division decision. She stated that she could not even check her mail because of her fear and anxiety but she did not say over what period she could not, or did not, check her mail. She must have been checking her mail, or having her mail brought to her, at some time between the arrival of the General Division decision and when she began preparing her April 11, 2019 response.

[7] When there is no evidence of the actual date that the decision was communicated to the Claimant, section 19(1) of the *Social Security Tribunal Regulations* (Regulations) deems the decision to have been communicated ten days from the date on which it is mailed. Because the decision is dated January 21, 2019, and was sent by regular mail with a letter dated January 22, 2019, I accept that the decision was communicated on February 1, 2019, in accordance with section 19(1) of the Regulations.

[8] The Appeal Division did not receive the Claimant's application for leave to appeal until April 11, 2019. Accepting that the decision was communicated on February 1, 2019, the application for leave to appeal is 69 days late.

[9] The application for leave to appeal is late.

ISSUE

[10] Should the Appeal Division exercise its discretion to grant an extension of time to file the leave to appeal application?

ANALYSIS

[11] Section 57(2) of the DESD Act grants the Appeal Division the discretion to allow further time for an applicant to make an application for leave to appeal. While this decision is within the Appeal Division's discretion, the Federal Court of Appeal has required that the Appeal Division consider certain factors in the exercise of that discretion.[1] These factors (referred to as the *Gattellaro* factors) are as follows:

a) The applicant demonstrates a continuing intention to pursue the appeal;
b) There is a reasonable explanation for the delay;
c) There is no prejudice to the other party in allowing the extension; and
d) The matter discloses an arguable case.

[12] The weight given to each of the above factors may differ in each case, and, in some cases, different factors will be relevant. According to the Federal Court of Appeal in *Canada (Attorney General) v Larkman*,[2] the overriding consideration is that the interests of justice be served.

Continuing intention

[13] I find that the Claimant has not demonstrated a continuing intention to pursue the appeal. The Claimant filed her application for leave to appeal about ten weeks after the date that the General Division decision was communicated to her. In that period, she did not attempt to file an application, nor did she write, call or email to seek information or advice, or inform the Tribunal of her intention to appeal. The Tribunal was not aware that the Claimant intended to appeal until it received the materials that it accepted as her application for leave to appeal on April 11, 2019.

[14] I wrote the Claimant on May 15, 2019, requesting that she elaborate on her reasons for delaying her application for leave to appeal. The Appeal Division received a response from the Claimant on July 2, 2019.

[15] The Claimant stated that she indicated her intention to appeal by making two phone calls to WorkSafe (the Worker's Compensation Board in BC), and by seeing her family doctor on

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[1] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883; *Muckenheim v Canada (Employment Insurance Commission)*, 2008 FCA 249.
[2] *Canada (Attorney General) v Larkman*, 2012 FCA 204.

numerous occasions. She also said she asked T. M. To help her with the appeal (presumably referring to the T. M. that is named as another support worker for the employer in the Claimant's letter of April 10, 2019[3]). I note that T. M. wrote an April 10, 2019, letter in support of the Claimant,[4] which the Claimant sent to the Appeal Division.

[16] The Claimant may have raised her concerns about her employer with WorkSafe or seen her doctor but this is not relevant to whether she has a continuing intention to appeal. If she spoke to T. M. about helping her or supporting her appeal, neither she nor T M. followed up with any actual contact with the Appeal Division.

[17] I am not satisfied that the Claimant has established that she had a continuing intention to pursue an appeal to the Appeal Division. My findings on this factor weigh against allowing the leave to appeal application to proceed.

Reasonable explanation

[18] The Claimant also does not have a reasonable explanation for the delay. The Claimant's explanation is that she has severe, debilitating phobias and panic attacks caused by her anxiety disorder. She says she has been on medication for 10 years for anxiety. She also asserts that her ex-boyfriend has been stalking her, verbally abusing her and threatening her, and even slashing her tires. Because of this, she says that she has been in a state of panic, anxiety and fear and unable to function normally.[5]

[19] The Claimant first described the manner in which her ex-boyfriend harassed her when she responded to my request that she provide additional information in support of her late leave to appeal application. Her own statement is the only evidence before me that this harassment occurred. Despite the very serious concerns she has described, she provided no statement or other evidence from friends, co-workers, doctor, the police, or any social assistance group, to corroborate her claim to have been harassed in the manner that she claims.

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[3] AD1B-13
[4] AD1-9
[5] AD1B-2

[20] In addition, the Claimant did not provide any evidence, beyond her own statement, that would show that her anxiety, or the manner in which her ex-boyfriend's harassment increased her anxiety, cause her to be unable to function to such an extent that she could not get her mail or call the Tribunal. There is no medical evidence to even confirm that the Claimant has been diagnosed with anxiety or any other psychological condition. The August 20, 2019, letter from her family doctor confirms that the Claimant told the doctor that she experienced emotional and physical abuse from her employer, but it does not mention anxiety. It. There is no medical opinion touching on how the Claimant's condition, or the manner in which she says her ex-boyfriend harassed her, would have affected her ability to respond to the General Division's decision or contact the Tribunal.

[21] I am not convinced that the Claimant had a reasonable explanation for not filing her appeal on time. Even if I accept that she suffers from anxiety made worse by the unwanted attentions of her ex-boyfriend, I would need more than the Claimant's say-so to find that she was prevented for ten weeks from reading her decision and calling the Tribunal, or having someone else read the decision and make enquiries on her behalf.

[22] This factor weighs against allowing the leave to appeal application to proceed.

Prejudice to the other parties

[23] The Claimant has suggested that the lateness of the leave to appeal application would not be unfair to the other party. There are two other parties: the Commission and the employer. I agree that the appeal would have no negative impact on the Commission. The Commission has not argued, or provided any evidence, that its ability to investigate or respond to the leave to appeal application would be significantly prejudiced by a ten-week delay.

[24] Similarly, I do not believe that it would be appreciably more difficult for the employer to respond to the Claimant's arguments that the General Division made an error, since these errors would have to relate to the fairness of the process at the General Division, the evidence that was available at the time, and the application of the law. There is no worry that the employer might not be able to find or produce additional evidence, since new evidence is rarely relevant (and rarely considered) in appeals to the Appeal Division. The employer has not offered any argument that she would be prejudiced by the fact that the Claimant was ten weeks late.

[25] I find that the delay in this case does not prejudice the other parties. This factor weighs in favour of allowing the leave to appeal application to proceed.

Arguable case

[26] The final *Gattellaro* factor is whether the Claimant has an arguable case. An arguable case has been equated to a reasonable chance of success.[6] This is essentially the same question I would have to decide on the leave to appeal application, if I were to grant the extension of time.

[27] I can only consider the three grounds of appeal in section 58(1) of the DESD Act and can only intervene in a decision of the General Division if I find that the General Division made an error under one or more of those grounds.[7] To find that the Claimant has an arguable chance of success on her appeal, I would have to find that there was a reasonable chance of success that the General Division made one of the types of errors described by the grounds of appeal in section 58(1) of the DESD Act. And set out below:

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
   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.

[28] The Claimant has not clearly identified in what way she believes the General Division to have made any of these errors. To each of the first two grounds,[8] the Claimant says that the employer lied and then she explains why she thinks the employer lied. To the third ground,[9] she says that the General Division did not have the evidence in front of it that would have proved that the employer lied (and she supplies some new evidence in the form of a co-worker's time sheet, a statement from the co-worker, and some additional explanation of her own.

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[6] *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.
[7] *Canada (Attorney General) v O'Keefe,* 2016 FC 503, *Marcia v. Canada (Attorney General)*, 2016 FC 1367.
[8] AD1B-4, 5
[9] AD1B-6

[29] I note that the Claimant disputed that the "physician did not write further documentation".[10] The Claimant said that the General Division could not know this because the General Division did not contact her doctor to investigate. However, it is not the General Division's role or duty to investigate. If the Claimant wishes the General Division to rely on additional evidence that was not already before the General Division, the Claimant has the responsibility of bringing that evidence to the attention of the General Division. The General Division stated that it was satisfied that the Claimant received notice of the hearing and the Claimant has not disputed this. However, the Claimant did not join the teleconference hearing, or send in documentary evidence or written submissions.

[30] The General Division can only make a decision on the evidence that is in front of it. This means that the Claimant has the responsibility to bring or submit any additional the evidence that she thinks she may need.[11] It is not an error for the General Division not to consider evidence that was not in the file or sent in by the Claimant. However, it would be an error if the General Division made its decision based on evidence that was not in the record.

[31] Furthermore, the Claimant cannot now submit new evidence to the Appeal Division that was not before the General Division because the Appeal Division cannot consider new evidence.[12] Nor can the Claimant simply resubmit her evidence and hope for a different decision.[13]

[32] The Claimant did refer to some evidence that was already before the General Division. For example, she refers to her own Record of Employment, her doctor's note, and to the Commission's notes of its conversation with the employer. The Claimant clearly disagrees with the General Division's assessment of that evidence and she states her reasons for disagreeing. However, she is unable to show how the General Division ignored or misunderstood any of the evidence without relying on evidence included in her Appeal Division submissions that was not

[10] AD1B-12, referring to General Division decision, para. 15
[11] See for example *T.W. v. Minister of Employment and Social Development*, 2018 SST 58
[12] *Mette v. Canada (Attorney General)*, 2016 FCA 276.
[13] *Bergeron v. Canada (Attorney General)*, 2016 FC 220.

available to the General Division. Simple disagreement with the General Division findings is not a valid ground of appeal.[14]

[33] It is not my role to reweigh or reassess the evidence that was before the General Division to reach a different conclusion than the General Division.[15] I must find that the General Division made an error by following an unfair process, making a mistake of law, or by making findings of fact that the evidence does not support. The Claimant has not directed me to any such error.

[34] In accordance with the direction from the Federal Court of Appeal in *Karadeolian v Canada (Attorney General)*[16], I have reviewed the record for any other significant evidence that might have been ignored or overlooked and that may, therefore, raise an arguable case. However, I have not been able to discover significant, relevant evidence that the General Division ignored or overlooked that might give rise to an arguable case.

[35] There is no arguable case that the General Division ignored or misunderstood any of the evidence when it found that the Claimant voluntarily left her employment and that she had reasonable alternatives to leaving. Therefore, this factor weighs against allowing the leave to appeal application to proceed.

[36] Three of the four *Gattellaro* factors weigh against allowing the extension of time, and the Claimant's inability to make out an arguable case is among them. In my view, it would not be in the interests of justice to allow the extension of time.

CONCLUSION

[37] The extension of time to apply for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	J. J., Self-represented

[14] *Griffin v. Canada (Attorney General)*, 2016 FC 874;
[15] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, *Bergeron v. Canada (Attorney General)*, 2016 FC 220, *Grosvenor v. Canada (Attorney General)*, 2018 FC 36.
[16] *Karadeolian v Canada (Attorney General)*, 2016 FC 615.