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

Citation: *M. L. v Canada Employment Insurance Commission*, 2019 SST 911

Tribunal File Number: AD-19-256

BETWEEN:

M. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 27, 2019

Canada

DECISION AND REASONS

DECISION

[1] I am turning down the Claimant's request for an extension of time and his application for leave to appeal.

OVERVIEW

[2] The Applicant, M. L. (Claimant), a mechanic-labourer, applied for Employment Insurance benefits. He said that he quit his employment for health or medical reasons.[1] His employer filled out a record of employment that said the Claimant quit his job.[2] The Respondent, the Canada Employment Insurance Commission (Commission), contacted the Claimant who then denied that he voluntarily quit his employment.[3] In return, the Employer said that there was a mutual agreement that the Claimant would quit.[4]

[3] The Commission determined that the Claimant had voluntarily left his employment without just cause and that voluntarily leaving was not his only reasonable alternative. The Commission maintained its decision on reconsideration.[5]

[4] The Claimant appealed the Commission's reconsideration decision to the General Division. The Claimant says that he developed stress from being sexually harassed at work. He emphasized that he did not quit his job, but that his employer told him to leave. The General Division dismissed the appeal. The Claimant is now seeking leave to appeal the General Division's decision, on the ground that 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. This means that the Claimant has to get permission from the Appeal Division before he can move on to the next stage of the appeal.

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[1] Application for Employment Insurance benefits, filed September 6, 2017, at GD3-8 to GD3-12.
[2] See record of employment dated August 22, 2017, at GD3-24.
[3] See Supplementary Record of Claim, dated October 31, 2017, at GD3-26.
[4] See Supplementary Record of Claim, dated October 31, 2017, at GD3-27.
[5] Commission's reconsideration dated December 19, 2017, at GD3-40 to GD3-41.

[5] First off, I must decide whether the Claimant filed his application to the Appeal Division on time. If not, I have to decide whether to extend the time for the Claimant to file his application with the Appeal Division. Finally, if I extend the time for filing of the application, I have to decide whether the appeal has a reasonable chance of success. A reasonable chance of success is the same thing as an arguable case at law.[6]

[6] I am not satisfied that there is an arguable case, and I am therefore turning down the Claimant's request for an extension of time to file the application for leave to appeal. I am also turning down his application for leave to appeal.

ISSUES

[7] The issues are:

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

[8] No. The Claimant did not file his application on time.

[9] 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.

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[6] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[10] In his application to the Appeal Division, the Claimant does not disclose when the Social Security Tribunal communicated the General Division's decision to him. I note, however, that the Social Security Tribunal sent a letter dated October 9, 2018, along with the decision, to the Claimant. The Tribunal sent an email dated October 10, 2018, to the Claimant, enclosing a copy of the decision, but the Claimant already told the Tribunal on August 22, 2018, that he does not have access to email.

[11] Ordinarily, for email communications, the decision would be deemed to have been communicated to the Claimant the next business day after the day on which the decision was transmitted.[7] However, the Claimant said that he does not have access to email, so he did not get the decision the day after the Tribunal sent it to him by email.

[12] Instead, the decision is deemed to have been communicated to the Claimant on October 19, 2018, 10 days after the day on which it was mailed to him.[8] Therefore, as noted above, under subsection 57(1)(a) of the DESDA, the Claimant was required to have filed an application for leave to appeal by no later than November 19, 2018. As the Claimant's application to the Appeal Division is date-stamped received on April 9, 2019, the Claimant was clearly late—by about five months—when he filed his application requesting leave to appeal with the Appeal Division.

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

[13] Because the Claimant was late when he filed his application with the Appeal Division, he has to get an extension of time. I can extend the time, if the Claimant's application was made within a year when he got the decision,[9] and if he shows that an extension is in the interests of justice. [10] Other relevant factors to consider when deciding whether to grant an extension of time include whether:

- there is an arguable case on appeal or some potential merit to the application;

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[7] *Social Security Tribunal Regulations*, subsection 19(1)(c).
[8] *Ibid*., *subsection* 19(1)(a).
[9] Subsection 57(2) of the DESDA says that I can allow, "further time 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."
[10] *X (Re)*, 2014 FCA 249; *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

- 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.

[14] In one case, the Federal Court of Appeal also considered whether the party had a continuing intention to pursue the application.[11]

[15] The Claimant has not stated whether he had a continuing intention to pursue an appeal. Although the delay involved is approximately five months, the Commission is unlikely to face any prejudice if I were to grant an extension of time. The Claimant explains that he was late in filing his application because of stress. His stress is well documented. Indeed, the General Division acknowledged and accepted that the Claimant was undergoing a lot of stress. The Claimant's health explains why he was late when he filed his application to the Appeal Division.

[16] The fact that the Claimant has not stated whether he had a continuing intention 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.

Arguable case

[17] 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. I asked the Claimant to identify the alleged erroneous findings of fact. He suggests that the General Division overlooked the fact that he was forced to leave his employment because of high stress levels, anxiety, and high blood pressure that he developed from being sexually harassed. His physicians have prescribed him anti-anxiety medication.[12]

[18] In fact, the General Division addressed the Claimant's allegations of sexual harassment, at paragraphs 19 to 20 of its decision. The General Division had little detail regarding the

[11] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.
[12] See Claimant's email dated June 17, 2019, at AD1C.

allegations of sexual harassment. It concluded that there were insufficient facts to support a finding of sexual harassment by the employer. The General Division noted that the employer assured the Claimant that it was no longer letting the individual who had been harassing the Claimant to return to the workplace. The General Division also noted that the Claimant said he would return to the job, if given the chance. The General Division found that there was insufficient evidence to find that the Claimant had just cause for leaving his job because of sexual harassment by his employer.

[19] The Claimant does not challenge these facts that the General Division set out, and there is no other evidence to suggest that the General Division made an error regarding the facts. As such, I am not satisfied that there is an arguable case that the General Division based its decision on an erroneous finding of fact regarding the Claimant's claims that he left his job because of sexual harassment.

[20] The Claimant now says his employer, certain customers, and the employer's close friends sexually harassed him. He gave a few details about how this harassment occurred. The General Division did not have this evidence. I asked the Claimant whether he wanted to apply to rescind or amend the General Division's decision, based on these facts or any new facts that he has regarding the sexual harassment that he allegedly faced at his job.[13] The Claimant did not respond to say whether he wanted to apply to rescind or amend the General Division's decision because of any new material facts that he might have.

[21] It seems that the Claimant is asking me to reconsider the General Division's decision and to give a more favourable decision. However, subsection 58(1) of the DESDA does not allow for a reassessment of the evidence or a rehearing of the matter.

[22] I have reviewed the underlying record, to ensure that the General Division neither erred in law nor overlooked or misconstrued any important evidence or arguments. The General Division member's summary of the facts is consistent with the evidentiary record. The member considered the evidence that was before her. She examined whether the Claimant had voluntarily left his employment, whether he had just cause to voluntarily leave his employment, and whether

[13] See Tribunal letter to Claimant, dated July 16, 2019.

he had any reasonable alternatives to leaving. I do not see any errors in the member's legal analysis.

[23] In summary, I am not satisfied that the appeal has a reasonable chance of success or that there is an arguable case on the ground that the General Division based its decision on an erroneous finding of fact, based on the facts before it.

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

[24] For the reasons that I have described above, I am not satisfied that the appeal has a reasonable chance of success and I am therefore turning down the Claimant's application for leave to appeal.

CONCLUSION

[25] Because I am not satisfied that there is an arguable case, I am denying the request for an extension of time. I am also refusing the application for leave to appeal.

Janet Lew
Member, Appeal Division

APPLICANT:	M. L., Self-represented