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

Citation: *J. M. v Canada Employment Insurance Commission*, 2019 SST 837

Tribunal File Number: AD-18-792

BETWEEN:

J. 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: September 3, 2019

Canada

DECISION AND REASONS

DECISION

[1] An extension of time to apply for leave to appeal and the application for leave to appeal are refused.

OVERVIEW

[2] The Applicant, J. M. (Claimant), is seeking leave to appeal the General Division's decision dated October 3, 2018. Leave to appeal means that an applicant has to get permission from the Appeal Division before they can move on to the next stage of the appeal process.

[3] The General Division determined that the Claimant was disqualified from receiving Employment Insurance benefits for having voluntarily left his employment without just cause, and that he should be subject to a warning for having knowingly made false statements when he filed Employment Insurance reports. The disqualification left him with a significant overpayment of benefits that he has to repay. The Claimant argues that the General Division erred.

[4] Before I can consider the Claimant's application for leave to appeal, I have to decide whether the Claimant filed his application to the Appeal Division – Employment Insurance on time and, if not, whether it is appropriate for me to give an extension of time to file the application. This involves examining whether there is an arguable case. An arguable case is the same thing as a reasonable chance of success.[1] It is only after granting an extension of time that I can then decide whether to grant leave to appeal.

[5] 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 to the Appeal Division. For the same reason, I am also turning down his application for leave to appeal.

FACTUAL BACKGROUND

[6] In January 2016, the Applicant, J. M. (Claimant), applied for and began receiving Employment Insurance regular benefits. However, after re-examining the Claimant's claim, the

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

Respondent, the Canada Employment Insurance Commission (Commission), decided that it could not pay him any benefits starting June 12, 2016. It determined that the Claimant had voluntarily left his employment with X on June 18, 2016, without just cause and that voluntarily leaving his job was not his only reasonable alternative.[2]

[7] The Commission also determined that the Applicant had failed to correctly report his earnings from four different employers, between the weeks beginning January 10, 2016 and February 5, 2017. The Commission took these earnings and allocated them, which resulted in an overpayment of over $15,000 that the Claimant had to repay. On top of that, the Commission determined that the Claimant had knowingly made false representations, so imposed a monetary penalty and violation. This meant that the Claimant would need more insurable hours to qualify for benefits in future.

[8] The Claimant denied that he voluntarily left his employment with X. He claimed that he left because there was a shortage of work available and he left for another place that gave him more hours.[3] He also claims that he did not knowingly misreport his earnings. On reconsideration, the Commission adjusted the allocation of the earnings, based on new information from one of the Claimant's employers. This resulted in a slightly reduced overpayment. The Commission also decided that it would not be seeking a monetary penalty, although it issued a penalty in the form of a warning. The Commission also removed the violation.[4] The Commission still decided that the Claimant had voluntarily left his employment.[5]

[9] The Claimant appealed the Commission's reconsideration decisions to the General Division. The Claimant did not attend the teleconference hearing before the General Division. The General Division checked to ensure that the Social Security Tribunal had served the Claimant with the notice of hearing. It then proceeded with the hearing in the Claimant's absence.

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[2] See Commission's letter dated November 9, 2017, at GD3A-24 to GD3A-25 and GD3B-174 to GD3B-177.
[3] See Request for reconsideration dated December 14, 2017, at GD3A-28 to GD3A-29 and GD3B-180 to GD3B-182.
[4] See Commission's reconsideration decision dated February 16, 2018, on the issues of earnings, misrepresentation/penalty, and violation, at GD3B-191 to GD3B-193.
[5] See Commission's reconsideration decision dated February 16, 2018, on the issue of voluntarily leaving, at GD3A-34 to GD3A-35 and GD3B-194 to GD3B-195.

[10] After reviewing the evidence before it, the General Division found that the Claimant voluntarily left his employment without just cause. He was therefore disqualified from receiving benefits. The General Division also found that the income that the Claimant received from his employers were earnings for benefit purposes and that the Commission correctly allocated them. The General Division also found that the Claimant knowingly made false statements when he completed his claims for benefits and that the Commission acted judicially when it issued a warning. The Claimant is now seeking leave to appeal the General Division's decision.

ISSUES

[11] The issues are:

> **Issue 1:** Did the Claimant file his application to the Appeal Division – Employment Insurance on time?
>
> **Issue 2:** If not, should I exercise my discretion and extend the time for filing the application to the Appeal Division – Employment Insurance?
>
> **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 to the Appeal Division – Employment Insurance on time?

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

[13] 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.

[14] In his application to the Appeal Division, the Claimant does not say when the Social Security Tribunal communicated the General Division's decision to him, but he acknowledges that he was late when he filed his application. When he filed his application on November 29,

2018, he explained that he was late because he was waiting to see a lawyer and was unable to get an appointment to see the lawyer until December 10, 2018.

[15] In terms of calculating how late the Claimant was, the Social Security Tribunal sent a letter dated October 4, 2018, along with the decision, to the Claimant. The decision is deemed to have been communicated to the Claimant 10 days after the day on which it was mailed to him, which in this case is October 14, 2018,.[6] 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 within 30 days, on November 13, 2018. As the Claimant's application to the Appeal Division is date-stamped received on November 29, 2018, the Claimant was approximately two weeks late when he filed his application.

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

[16] 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,[7] and if an extension is in the interests of justice.[8] 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;

- 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.

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[6] See *Social Security Tribunal Regulations*, subsection 19(1)(c).
[7] 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."
[8] See *X (Re)*, 2014 FCA 249; *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[17] In one case, the Federal Court of Appeal also considered whether the party had a continuing intention to pursue the application.[9]

[18] The Commission is unlikely to face any prejudice because the delay is relatively short. The Claimant had a continuing intention to pursue an appeal because he had been waiting for an appointment to see a lawyer. However, that does not reasonably explain why he could not have filed his application to the Appeal Division earlier, particularly as he did not set out any grounds when he eventually filed the application. This alone would not serve as a bar to an extension.

[19] Of greater concern is whether there is an arguable case. In determining whether it is in the interests of justice to extend the time for filing, generally I give greater weight to whether there is an arguable case, in the absence of any other special circumstances.

Arguable case

[20] Subsection 58(1) of the DESDA sets out the only three grounds of appeal. 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.

[21] As I noted above, an arguable case is the same thing as a reasonable chance of success. This is a relatively low bar because claimants do not have to prove their case; they simply have to show that there is an arguable case. At the actual appeal, the bar is much higher.

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[99] See *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[22] The Claimant argues that the General Division erred under subsection 58(1)(c) of the DESDA, but he has not identified any specific erroneous findings of fact. He wanted a legal expert look at the file before he submitted further information. The Social Security Tribunal followed up with the Claimant, asking him to provide information to support his application:

- On November 30, 2018, the Social Security Tribunal wrote to the Claimant, acknowledging that it had received his application to the Appeal Division. It noted that more information was needed. It asked him to explain why he was appealing the General Division's decision. It gave him until December 31, 2018, to provide the missing information. The Tribunal did not receive any response by this date.

- On April 3, 2019, the Tribunal wrote to the Claimant again. It asked him to explain why he was appealing the General Division's decision and to explain why he had filed his application more than 30 days after the General Division had been communicated to him. The Tribunal's letter was returned undelivered.

- On May 8, 2019, the Tribunal resent its letter of April 3, 2019, to the Claimant, asking for a response by no later than June 3, 2019. The Tribunal did not receive any response from the Claimant.

- On June 12, 2019, the Tribunal contacted the Claimant by telephone, asking if he still intended on pursuing his application to the Appeal Division. The Claimant stated that he had other priorities and so did not have any time to direct his attention to the matter. He also stated that he was trying to seek legal assistance. The Tribunal asked the Claimant to file a written request for an extension of time. The Claimant said that he would try to file a request for an extension of time.

- On June 25, 2019, the Tribunal wrote to the Claimant again:

> Close to half a year has passed since you filed your application for leave to appeal. You have not taken any steps to move this matter forward.
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> Please provide a response to the previous letter dated November 30, 2018 and May 8, 2019, copies of which are enclosed, explaining the reasons or grounds for

> appeal, by no later than **Wednesday, July 31, 2019.** Absent exceptional circumstances, the Tribunal will not be granting any additional extensions of time and will be proceeding with the application on the basis of the materials already on file.
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> The Tribunal did not receive any response from the Claimant.

[23] Almost ten months have passed since the General Division made its decision. The Claimant has not taken any steps to move this matter forward. The Claimant has yet to identify any erroneous findings of fact or, for that matter, any other errors.

[24] I have reviewed the underlying record. I do not see that the General Division erred in law, whether or not the error appears on the record, or that it failed to properly account for any of the key evidence before it.

[25] On the issue of voluntary leave, the evidence shows that the Claimant let his employment because he was dissatisfied with the limited hours that he was getting and, overall, it was more worthwhile for him to collect Employment Insurance, rather than remain working.[10]

[26] On the issue of the Claimant's earnings, the only evidence of any earnings on file were from each of the Claimant's employers. The Claimant did not have any of his own evidence to rebut the information from his employers. The evidence also shows that the Claimant knowingly made false statements, particularly where he denied that he had been working or had any earnings during specific periods. His employers may have paid him weeks after he worked, but he had been working. The evidence also shows that there were mitigating circumstances.

[27] The General Division took all of this evidence into account. The General Division member's summary of the facts is consistent with the evidentiary record and his analysis is sound and comprehensive. The member correctly set out the law and applied the law to the facts. As such, I am not satisfied that there is an arguable case and, for this reason, I see no reason to grant an extension of time for the Claimant to file his application to the Appeal Division.

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[10] See Investigation Information Sheet, at GD3A-18 and GD3A-23, and Request for Reconsideration at GD3A-28, and Supplementary Record of Claim dated February 13, 2018, at GD3A-31.

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

[28] 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 to the Appeal Division – Employment Insurance.

CONCLUSION

[29] 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:	J. M., Self-represented