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

Citation: *R. D. v Canada Employment Insurance Commission*, 2019 SST 978

Tribunal File Number: AD-19-538

BETWEEN:

R. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Stephen Bergen

Date of Decision: September 8, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. D. (Claimant) failed to report to work on September 20, 2018. His employer considered that the Claimant had abandoned his employment and issued a Record of Employment (ROE) stating that he had quit his employment.

[3] On December 18, 2018, the Claimant applied for Employment Insurance benefits stating that his last day of work was August 23, 2018, and that he was in jail between August 16, 2018, and December 17, 2018. In his application, he said that he was on a leave of absence because of his incarceration.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant lost his employment due to misconduct, and that he was not entitled to regular Employment Insurance benefits. The Claimant requested a reconsideration arguing that his loss of employment was involuntary because he was incarcerated. The Commission upheld their initial decision.

[5] The Claimant appealed to the General Division of the Social Security Tribunal but the General Division dismissed his appeal. He now seeks leave to appeal to the Appeal Division, however the application for leave to appeal was filed late.

[6] The Claimant has not demonstrated either a continuing intention to appeal nor given a reasonable explanation for the lateness of his appeal. In addition, I am not satisfied that he would have a reasonable chance of success on appeal. I have therefore exercised my discretion to refuse the late application for leave to appeal.

PRELIMINARY MATTERS

Was the application for leave to appeal filed late?

[7] Before I can consider whether to grant leave to appeal, I must determine whether the leave to appeal application was late. According to section 57(1) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal will not be late if it is made within 30 days after the day on which the General Division decision is communicated to a party.

[8] There is no information on file that would confirm the exact date that the decision was actually communicated to the Claimant. The Claimant filed a leave to appeal application on August 1, 2019. In his application, he stated that "this is the first time that [he was] able to access his file again" but he did not say whether he had received a copy of the General Decision at any earlier date. The Tribunal records include a letter dated May 7, 2019, attaching the General Division decision. The Claimant called the Tribunal on May 14, 2019. At that time, the Tribunal confirmed that the General Division had reached a decision on his appeal and that told the Claimant that it had written to all of the parties to communicate the decision. The Claimant's response to that information is not recorded.

[9] 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 May 6, 2019, and was sent by ordinary mail with a letter dated May 7, 2019, I accept that the decision was communicated on May 17, 2019, in accordance with section 19(1) of the Regulations.

[10] The Appeal Division did not receive the Claimant's application for leave to appeal until August 1, 2019. Accepting that the decision was communicated on May 17, 2019, the application for leave to appeal is 76 days late.

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

ISSUE

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

ANALYSIS

[13] 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 identified certain factors that the Appeal Division must consider when it decides how it will exercise its 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.

[14] 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

[15] I find that the Claimant has not demonstrated a continuing intention to pursue the appeal. The Claimant filed his application for leave to appeal about eleven weeks after the date that the General Division decision was communicated to him. Although, he called for an update on May 14, 2019, he did call again, write, or email to seek information or advice, and he did not file his leave to appeal application until August 1, 2019. The Claimant called the Tribunal on July 30, 2019, to ask for a copy of the decision to be emailed to him in "treatment". The Tribunal was not aware that the

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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.

Claimant intended to appeal until it received the materials that it accepted as his application for leave to appeal.

[16] In his leave to appeal application, the Claimant stated that the application was late because he had been in jail again and then in hospital, and that he was still in treatment. I wrote the Claimant on August 9, 2019, requesting that he elaborate on his reasons for delaying his application for leave to appeal. I outlined the *Gattellaro* factors, and asked that he address each factor in his response. The Claimant did not respond to my letter, except that he did call the Tribunal on August 13, 2019, to say that he had been incarcerated for three months, that he had a new home address, and that he no longer had access to the email address that he had provided on July 31, 2019.

[17] There is no evidence of the date of his move, of the dates that he was incarcerated, or of any of the dates that he was either in hospital or in treatment. He did not explain how these various circumstances prevented him from responding to the General Division decision for the entire period of his delay, or from updating the Tribunal on his intentions.

[18] I find that the Claimant's actions do not demonstrate a continuing intention to appeal. This factor weighs against allowing the leave to appeal application to proceed.

Reasonable explanation

[19] Although it is possible that the Claimant's incarceration, hospitalization and treatment, or his change of address, might reasonably explain his failure to appeal on time, this would depend on the degree to which the Claimant was restricted from applying by his incarceration or medical treatment, whether there were any intervening periods in which he was not incarcerated, hospitalized or in treatment.

[20] The Claimant has provided no documentation to corroborate that he was incarcerated between May 17, 2019, and August 1, 2019, or that he was medically incapacitated in some fashion during that period. His own submissions are too vague to allow me to determine whether it was reasonable for his application to be filed eleven weeks late.

[21] I find that the Claimant has not provided a reasonable explanation for his late appeal. My findings on this factor weigh against allowing the leave to appeal application to proceed.

Prejudice to the other parties

[22] The third *Gattellaro* factor is concerned with whether the lateness of the leave to appeal application would be unfair to any other party. There is only one other party to the appeal which is the Commission. In my view, the lateness of 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 the delay.

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

Arguable case

[24] The final *Gattellaro* factor is whether the Claimant has an arguable case. An arguable case has been equated to a reasonable chance of success.[3] 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.

[25] 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.[4] 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,
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.

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

[26] As his grounds of appeal, the Claimant selected error of law and erroneous finding of fact. Specifically, he said that he was found not guilty of any charges and that it was the fault of the Crown and the police (that he was found to have lost his employment due to misconduct, presumably). The Claimant has not clearly identified in what way he believes the General Division to have made any of these errors.

Error of law

[27] The Claimant has not pointed to any error of law, and no error of law is apparent to me. The General Division applied section 30 of the *Employment Insurance Act* (EI Act) which provides that a claimant who is dismissed for misconduct or who voluntarily leaves his or her employment without just cause is disqualified from benefits. It did not find that the Claimant had voluntarily left his employment under section 29 of the EI Act but, instead; analyzed the facts to find that the Claimant was dismissed for misconduct. The General Division properly noted that "misconduct" and "voluntarily leaving without just cause" are notions that are linked in the legislation and that the Federal Court of Appeal has allowed that either section may be applied to the circumstances as the facts require.[5]

[28] The General Division referenced applicable and current jurisprudence from the Federal Court of Appeal in relation to its interpretation of misconduct.[6] It also referenced Appeal Division decisions that address the specific circumstance where a claimant has lost a required licence, but carefully noted that it was not bound to follow those decisions.

[29] There is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act.

Erroneous finding of fact

[30] The other ground of appeal advanced by the Claimant is that the General Division erred by basing its decision on an erroneous finding of fact. However, the Claimant has not said which

[5] *Canada (Attorney General) v. Easson,* A-1598-92
[6] *Canada (Attorney General) v. Lemire*, 2010 FCA 314

finding or findings were erroneous, or how the General Division mistook or ignored key evidence to reach its findings, or how any finding was otherwise unsupported by the evidence.

[31] The General Division did not ignore the Claimant's evidence. It acknowledged that the Claimant was incarcerated from October 17, 2018, to December 17, 2018, as a result of charges brought against him on June 23, 2018, and it understood that these charges were later dismissed on January 3, 2019.

[32] However, the General Division did not base its decision on those charges or the Claimant's incarceration. Rather, the General Division found that the Claimant lost his employment because his driver's licence had been suspended due to his arrest on September 17, 2018, for a charge of driving under the influence of alcohol (and that he required his licence for his work), and because he did not report for work on September 20, 2018.

[33] The Claimant did not argue that the General Division was mistaken as to these additional facts. Even so, the Federal Court has directed the Appeal Division that it should look beyond the stated grounds of appeal.[7] In accordance with that direction, I have reviewed the record for any other significant evidence that might have been overlooked or misunderstood and that may therefore, raise an arguable case. I could not identify any significant or relevant evidence that the General Division may have overlooked or misunderstood in reaching its findings.

[34] There is no arguable case that the General Division based its decision on any erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it—as would be required to find grounds for appeal under section 58(1)(c) of the DESD Act.

[35] The Claimant has no reasonable chance of success on appeal. This factor weighs against allowing the extension of time.

[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.

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[7] *Karadeolian* v. Canada (Attorney General) 2016 FC 615.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	R. D., Self-represented