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

Citation: *M. J. v Canada Employment Insurance Commission*, 2019 SST 1029

Tribunal File Number: AD-19-497

BETWEEN:

M. J.

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: October 16, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. J. (Claimant), established a claim for Employment Insurance benefits and collected benefits at the same time that she was receiving wages from employment. The Canada Employment Insurance Commission (Commission) later investigated the circumstances of her claim and discovered that the wages that the Claimant reported receiving were not the same as the wages that the employer reported paying. As a result, the Commission allocated additional wages as earnings against the Claimant's claim. This resulted in an overpayment. The Commission also imposed both a penalty and a serious violation because it accepted that the Claimant knowingly provided false or misleading information on her reporting declaration. All of these decisions were maintained by the Commission when the Claimant asked it to reconsider.

[3] The Claimant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal. The General Division allowed that the Notice of Violation should be removed, but dismissed the appeal on all other issues. The Claimant now seeks leave to appeal to the Appeal Division.

[4] Unfortunately, the Claimant's 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. The application for an extension of time to apply for leave to appeal is refused.

PRELIMINARY MATTERS

[5] When I first received the Claimant's appeal, I noticed that she hoped to have me consider new evidence that was not before the General Division. Because I could not consider this evidence, I wrote to the Claimant on July 29, 2019, to explain the rescind or amend process and

ask her if she wished the Appeal Division to hold off on making a decision while she tried to have the General Division revisit its earlier decision based on her new evidence. The Claimant did apply to the General Division to rescind or amend its decision but she was unsuccessful (GE-19-2923).

[6] Following the denial of that application, the Appeal Division reactivated the Claimant's appeal. On September 20, 2019, I wrote to the Claimant and asked her to explain why her application for leave was late, but also to clarify her position on how the General Division may have made an error under the grounds of appeal.

Was the Claimant's leave to appeal application filed late?

[7] 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.

[8] There is no information on file that would confirm the exact date that the decision was actually communicated to the Claimant. When the Claimant called the Tribunal on July 4, 2019, to ask for an appeal form, the Tribunal informed her that she should have applied within 30 days of the January 30, 2019. Her only response was that she had "lost her job at that time combined with house problems." However, she did not say when she first received the General Division decision.

[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 January 28, 2019, and was sent by regular mail with a letter dated January 30, 2019, I accept that the decision was communicated on February 9, 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 July 13, 2019. Accepting that the decision was communicated on February 9, 2019, the application for leave to appeal is more than 5 months 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 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.

[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 her application for leave to appeal about five months after the date that the General Division decision was communicated to her. The Claimant states in her Leave to Appeal application that she contacted the Tribunal several times both before and after she filed her Notice of Appeal to the General Division (received by the Tribunal on January 6, 2019). However, she did not contact the

[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.

Tribunal between the release of the General Division decision and her call to the Tribunal on July 4, 2019. 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.

[16] I am not satisfied that the Claimant 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

[17] The Claimant also does not have a reasonable explanation for the delay. The Claimant's explanation is that she was under severe stress following the loss of her job, and was dealing with a debt notice and family issues. She said that she had little time to respond to the notices that the Tribunal was sending her. She referenced a period of hospitalization in March 2018 and March 2019, and included a letter from her doctor confirming that she was hospitalized from March 27, 2019, to April 17, 2019.

[18] However, according to her Leave to Appeal application she was able to contact either or both of the Employment and Social Development Canada (presumably meaning the Commission) and the Canada Revenue Agency on November 5 and 27, 2018, and on January 4, January 9, January 11, and February 5, 2019. Although the Claimant did not attend the January 24, 2019, hearing, she was aware of the hearing date. She contacted the Tribunal again on January 11, 2019, to confirm that she had received the notice of hearing.

[19] I understand that the Claimant was in the hospital for three weeks in March and April 2019. However, her hospitalization does not explain why she did not appeal the General Division decision at any time in February or most of March, or at any time between mid-April and July. 2019. The Claimant also explained that she was experiencing job loss, financial hardship and some manner of family crisis; however, she has not explained how this prevented her from filing an appeal, and she has not described her circumstances in sufficient detail to allow me to infer any reasonable explanation. In my September 20, 2019, letter, I asked the Claimant to provide submissions or evidence that could explain why her appeal was late, and to address the other

factors that I must consider before deciding whether to grant an extension of time. The Claimant did not provide any additional information.

[20] I am not convinced that the Claimant had a reasonable explanation for not filing her appeal on time. Although she may have had a number of serious stressors in her life between the date of the General Division decision and when she filed her application for Leave to Appeal, I would need more than the Claimant's say-so to find that these circumstances prevented her from contacting the Tribunal at any time over a five-month period.

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

Prejudice to the other parties

[22] The third factor that I need to consider is the prejudice to the Commission. The Claimant's Leave to Appeal application was filed five months late, which is a significant delay. It is possible that such a delay could have prejudiced the Commission's ability to investigate or respond to the Leave to Appeal application. However, the Commission has not argued, or provided any evidence, of any actual prejudice or even suggested how its position may have been prejudiced.

[23] I consider this factor to neither support nor weigh against the granting of an extension of time.

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 am only authorized to consider the grounds of appeal set out in section 58(1) of the DESD Act. I 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 a reasonable chance of success on her appeal, I would have to find that there was a reasonable

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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.

chance that she could succeed in establishing 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.

[26] The grounds of appeal are 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.

[27] The Claimant selected only the third ground of appeal; the one that concerns an erroneous finding of fact. However, she has not clearly identified in what way she believes the General Division to have made such an error. The Claimant maintains only that the earnings reported to the Commission do not match the January 12, 2018, University of Manitoba pay statement.

[28] The Claimant has not addressed the question of whether she knowingly made a false statement except to say that she was under stress at the time. The General Division acknowledged the Claimant's testimony that she was under severe stress and that she misunderstood the questions on the claim reports but it did not find her explanation plausible in light of the particular declarations that she made on her claim reports.

[29] As far as the amount of the overpayment, the Claimant has not tried to argue that the General Division was mistaken to consider wages as earnings that should be allocated. Her concern focused on the amount of the overpayment.

[30] In its September 17, 2019, rescind or amend decision, the General Division rejected the Claimant's argument that the January 2018 pay statement represented new facts. It found instead that the pay amounts set out in the pay statement were amounts that would have been included in the total figures provided in the Record of Employment (ROE) dated April 2018. It noted that these figures also matched the information provided in June 2018 by the employer, in response to the Commission's request for payroll information.

[31] I have confirmed that the ROE and the payroll information agree as to the gross amount of wages paid to the Claimant in the evidence before the General Division. The same gross wage figures were the figures used to calculate the overpayment.

[32] The Claimant has not identified what evidence the General Division ignored in its original decision, or how it misunderstood the evidence, or how its determinations were perverse or capricious.

[33] In accordance with the direction from the Federal Court of Appeal in *Karadeolian v Canada (Attorney General)*,[5] 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.

[34] There is no arguable case that the General Division erred under section 58(1)(c) of the DESD Act by basing 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 ignored or misunderstood any of the evidence. Therefore, this factor weighs against allowing the leave to appeal application to proceed.

[35] 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

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

Stephen Bergen
Member, Appeal Division

Submissions:	M. J., Self-represented

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