



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *P. W. v Canada Employment Insurance Commission*, 2019 SST 1331

Tribunal File Number: AD-19-779

BETWEEN:

P. W.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: November 7, 2019

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, P. W. (Claimant), a X, is seeking leave to appeal the General Division's decision. 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 found that the Claimant was late when she filed an appeal with the Social Security Tribunal (Tribunal). The General Division refused to grant an extension of time for her to file her appeal.

[4] The Claimant argues that the General Division failed to observe a principle of natural justice. She also argues that the General Division failed to consider why she had been late in filing her appeal.

[5] I have to decide whether the appeal has a reasonable chance of success. For the reasons that follow, I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing leave to appeal.

ISSUES

[6] Is there an arguable case that the General Division failed to observe a principle of natural justice?

[7] Is there an arguable case that the General Division based its decision on a factual error that it made without regard for the material before it?

ANALYSIS

[8] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the three grounds of appeal listed in

subsection 58(1) of the Department of Employment and Social Development Act (DESDA). The appeal also has to have a reasonable chance of success.

[9] The only three grounds of appeal under subsection 58(1) of the DESDA are:

- (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.

[10] A reasonable chance of success is the same thing as an arguable case at law.¹ This is a relatively low bar because claimants do not have to prove their case; they just have to show that there is an arguable case. At the appeal, the bar is much higher.

Is there an arguable case that the General Division failed to observe a principle of natural justice?

[11] The Claimant argues that the General Division failed to observe a principle of natural justice. She argues that the process has been unfair.

[12] The Claimant claims that Canada Revenue Agency (CRA) bullied and harassed her. She says that CRA failed to provide her with any documents. She claims that CRA refused to give her a chance to address the issue of any overpayment that she might owe. She also claims that the Respondent misled her. (It is unclear if she is referring to CRA or the Canada Employment Insurance Commission.) Finally, no one explained to her what her options were, until September 2019, when someone told her that she could file an appeal with the Tribunal.

[13] None of these arguments however deals with whether the General Division process itself was fair. The DESDA limits what I can do. The Appeal Division can intervene and overturn a

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

decision of the General Division “only when a person shows that the General Division made an error of the sort listed under subsection 58(1) of the DESDA.”² That is not the case here, even though the Claimant argues that the General Division failed to observe a principle of natural justice under subsection 58(1)(a) of the DESDA.

[14] The Claimant’s dealings with CRA or the Commission were unrelated to the processes before the General Division. The Claimant may have relied on either CRA or the Commission to guide her through the Employment Insurance process. However, CRA and the Commission are separate and distinct entities from the General Division and the Social Security Tribunal. Any inaccurate advice or untimely information given by CRA or the Commission does not thereby become a failure under the Tribunal’s or General Division’s own processes. Besides, I note that the Commission told the Claimant in January 2018 what her next steps were in its reconsideration decision.³

[15] That said, I have to be satisfied that the General Division gave the Claimant a chance for her to fairly and fully present her case before it. I will now examine whether the General Division treated the Claimant fairly.

Process before the General Division

[16] The Claimant filed her appeal with the General Division on September 25, 2019. The next day, the Tribunal acknowledged that it had received the Claimant’s appeal. The Tribunal wrote:

The Notice of Appeal appears to have been filed more than 30 days after the date the Canada Employment Insurance Commission reconsideration decision was communicated to the Appellant.

If an appeal is filed beyond the 30-day time limit, the Tribunal must decide if an extension of time should be granted. An extension cannot be granted if more than one year has passed since the reconsideration decision was communicated to the Appellant.

² This is what the Federal Court of Appeal said in *Gittens v. Canada (Attorney General)*, 2019 FCA 256.

³ See Commission’s reconsideration decision dated January 2, 2018, at GD3-35 to GD3-36.

[17] On October 2, 2019, the Tribunal sent a copy of the “Reconsideration File”⁴ to the Claimant. On October 10, 2019, the General Division sent a letter to the Claimant. The General Division asked the Claimant the following:

The decision under appeal was rendered on January 2, 2018 (GD3-35 and 35). Please tell us the date that you received the decision.

[18] The Tribunal asked the Claimant to provide a response by no later than October 17, 2019. The Tribunal gave the Claimant a chance to say when she got the Commission’s reconsideration decision.

[19] This was the central issue to the Claimant’s appeal. If the Claimant filed her appeal with the General Division more than one year after she got the Commission’s reconsideration decision, it would be too late.⁵ The General Division would be unable to extend the time for her to file an appeal because of the DESDA.

[20] The Claimant does not deny that she ever received the Tribunal’s letter of October 10, 2019.

[21] The Tribunal did not receive any response from the Claimant to its letter of October 10, 2019. The General Division issued a decision based on the written materials on file, including its letter of October 10, 2019. It did not hold a hearing that involved the attendance of any of the parties.

[22] The Claimant does not suggest that the General Division deprived her of a chance to present her case without an in-person hearing, videoconference or teleconference. I also do not see that such a type of hearing was necessary to ensure that the General Division fairly treated the Claimant.

⁴ Reconsideration file (36 pages), at GD3.

⁵ See section 52 of the DESDA. The section says that an appellant has 30 days after they get the reconsideration decision by which to file an appeal with the General Division. If an appellant is late, the General Division may extend the time for filing, but “in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.”

[23] The Claimant does not allege that she did not get a fair chance to say when she got the Commission's reconsideration decision, or to explain why she was late. As far as I can determine, the Tribunal and the General Division provided the Claimant with a fair opportunity to answer the question about when she got the reconsideration decision.

[24] Firstly, there was section "4 - Appeal of a Reconsideration Decision" in the Notice of Appeal with the General Division where the Claimant could say when she received the reconsideration decision. Secondly, at "7 - Late Appeal," in the Notice of Appeal, the Claimant could explain why her appeal was late. The Claimant filled out the Notice of Appeal with the General Division stating that she could not remember when she received the Commission's reconsideration decision. She also explained why she was late in filing her application. By completing section 7 – Late Appeal, it seemed that the Claimant was acknowledging that she was late when she filed her appeal.

[25] Although the Claimant already stated in her Notice of Appeal when she got the Commission's reconsideration decision, the General Division still sent her its letter of October 10, 2019. It asked the Claimant when she received the reconsideration decision.

[26] I do not see anything procedurally unfair or any procedural irregularities or issues that arose in the proceedings before the General Division that affected the Claimant's right to be heard or to answer the case. The General Division gave the Claimant a fair chance to present her case. As such, I am not satisfied that the General Division failed to observe a principle of natural justice.

Is there an arguable case that the General Division based its decision on a factual error that it made without regard for the material before it?

[27] The Claimant argues that the General Division overlooked many facts when it decided if her application was late. These include the fact that government employees allegedly threatened and bullied her. They also misled or failed to give her information or documents, despite her numerous requests. Also, they failed to give her timely information about any options she had, such as appealing her claim.⁶

⁶ See Application to the Appeal Division – Employment Insurance, at AD1-3.

[28] The General Division noted that it could allow further time for the Claimant to file her appeal. It could extend the time, but only if she filed the appeal within a year when she got the reconsideration decision. The evidence suggested that she was late when she filed her appeal:

- i. The Claimant had asked the Commission for a reconsideration. She wrote, “Request for Reconsideration was made within legal parameters of Appeal deadline of 30 days.”⁷
- ii. In her Application to the Appeal Division – Employment Insurance, the Claimant noted that she did not have to explain why her application was late. She wrote, “Does not apply on Appeal Level 2 Decision was dated October 30, 2019.”
- iii. Unlike her request for a reconsideration or application to the Appeal Division, the Claimant did not deny or otherwise suggest that she was late when she filed her appeal with the General Division.

[29] The General Division concluded that the Claimant likely received the reconsideration decision by January 12, 2018. The Claimant does not dispute this finding.

[30] Under the DESDA, the Claimant therefore had to file an appeal of the reconsideration decision by January 12, 2019, “[no] more than one year after the day on which the decision is communicated to the appellant.”⁸

[31] The General Division member found that the Claimant filed her appeal 590 days late.⁹ This was more than one year after the reconsideration decision had been communicated to her. The DESDA restricted the General Division from being able to extend the time for filing an appeal after one year had already passed.¹⁰ The General Division did not have any leeway or flexibility about this deadline.

⁷ See Request for Reconsideration, at GD3-29.

⁸ See subsection 52(1)(b) of the DESDA.

⁹ See General Division decision at para. 10.

¹⁰ In *Fazal v. Canada (Attorney General)*, 2016 FC 487, the Federal Court said that the DESDA does not permit any discretion to be applied where an application is made more than one year after the day on which the decision is communicated to an appellant. The Federal Court made this decision in the context of a leave to appeal application under subsection 57(2) of the DESDA, but the wording of subsection 57(2) of the DESDA is the same wording used in subsection 52(2) of the DESDA.

[32] If the Claimant had filed her appeal more than one year after the date that the reconsideration decision was communicated to her, she was out of luck. It did not matter why she was late. In other words, the Claimant's treatment by CRA and the Commission were irrelevant to whether the General Division could extend the time for filing the appeal.

[33] Even so, the General Division in fact had considered the Claimant's explanation that she had been trying to resolve the matter with CRA. The General Division wrote, "regardless of the [Claimant's] explanation, I cannot extend the filing deadline." In other words, the General Division did not overlook the Claimant's explanation. The DESDA simply did not allow the General Division to extend the deadline after one year.

[34] I am not satisfied that the General Division failed to consider the Claimant's circumstances or why she was late in filing her appeal.

CONCLUSION

[35] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am refusing the application for leave to appeal.

Janet Lew
Member, Appeal Division

APPLICANT:	P. W., Self-represented
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