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

Citation: *H. J. v Canada Employment Insurance Commission*, 2019 SST 1336

Tribunal File Number: AD-19-680

BETWEEN:

H. 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: November 12, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, H. J. (Claimant), worked as a X. After she was laid off, she applied for Employment Insurance benefits and a benefit period was established. Not long afterwards, the Canada Employment Insurance Commission (Commission), asked her to prove that she was looking for work. The Commission was not satisfied with her job search efforts and did not accept that she was available for work within the meaning of the *Employment Insurance Act* (EI Act). This meant that the Claimant was disentitled from receiving benefits.

[3] The Claimant asked for a reconsideration, but the Commission maintained its initial decision in response. The Claimant appealed the decision to the General Division of the Social Security Tribunal, which dismissed her appeal. The Claimant now seeks leave to appeal to the Appeal Division.

[4] The Tribunal received the Claimant's application out of time, and it is not in the interests of justice to grant an extension of time. The Appeal Division will not consider the Claimant's application for leave to appeal.

PRELIMINARY MATTERS

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

[5] 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.

[6] There is no information on file that would confirm the exact date that the decision was actually communicated to the Claimant. The Claimant called the Tribunal on July 26, 2019, to disagree with the decision. She did not say when she received the General Division decision but it had to have been before July 26, 2019.

[7] 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 July 9, 2019, and was sent by regular mail with a letter dated July 10, 2019, I accept that the decision was communicated on July 20, 2019, in accordance with section 19(1) of the Regulations.

[8] The Appeal Division did not receive the Claimant's application for leave to appeal until October 7, 2019. Accepting that the decision was communicated on July 20, 2019, the Tribunal received the application for leave to appeal just over 11 weeks after it was communicated.

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

ISSUE

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

ANALYSIS

[11] Because the Claimant's application for leave to appeal did not explain why she filed her application late, I wrote to ask her for her reasons on October 11, 2019. The Claimant responded with a letter dated October 25, 2019. She wrote that she had been hosting company from another province and that it was confusing to have other people around.

[12] 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;

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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.

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.

[13] 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

[14] I find that the Claimant has not demonstrated a continuing intention to pursue the appeal. The Claimant contacted the Tribunal on July 26 and received advice on how to appeal the General Division decision. At that time, she was still within the allotted 30 days to file an appeal. However, she did not write, call or email the Tribunal again until she filed her appeal. In other words, there is no evidence that the Claimant took any steps to pursue her appeal for another 73 days.

[15] 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

[16] The Claimant does not have a reasonable explanation for the delay. The Claimant's only explanation for her delay is that she had company from another province and that it was confusing to have other people around.[3] From the time the decision is deemed to have been communicated, it was another 79 days before she filed the appeal. She says that she was confused by having company, but she does not say how long she had company. She does not say that her company stayed throughout the entire period from the time she received the decision on July 20, until she finally filed the application; or even that she had company for the entire period that her application was late.

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[2] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[3] AD1-B

[17] The Claimant called the Tribunal on July 26, at which time a registry officer discussed the appeal process with her and committed to send her the appeal application form. If the Claimant's company had not yet arrived when she called the Tribunal, then having company would not have interfered with her filing her application at a time when she was still within the 30-day deadline. If she did have company, it apparently did not interfere with her review of the General Division decision and with her call to the Tribunal to get additional appeal information. One might expect she could still complete and send in the application form.

[18] It is also possible that the Claimant's company arrived just after her call and before she received the form, but this is just conjecture. The Claimant has not explained how the presence of company created such confusion that she could not file her leave to appeal application. She did not dispute that she received the application form from the Tribunal and she did not call the Tribunal again after the July 26 call.

[19] Having said that, I do not doubt that having company in her home may have distracted the Claimant at some point, or in some degree, from the appeal or its filing requirements, or that it contributed in some other fashion to the Claimant's delay. However, there is not enough detail in the Claimant's explanation to satisfy me that she could not have filed the application earlier than October 7, 2019. Given the length of the delay, I do not consider "having company" to be a reasonable explanation.

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

Prejudice to the other parties

[21] The third factor that I need to consider is the prejudice to the Commission. The Claimant filed her leave to appeal application about 7 weeks after the 30-day deadline had passed. This is a significant delay, but not so significant that I would expect it to have prejudiced the Commission's ability to investigate or respond to the leave to appeal application. Furthermore, the Commission has not argued, or provided any evidence, of any actual prejudice, or even suggested that its position has been prejudiced.

[22] I do not find that the delay was of appreciable prejudice to the Commission. I consider this factor to weigh in favour of granting of an extension of time.

Arguable case

[23] The final *Gattellaro* factor is whether the Claimant has an arguable case. An arguable case has been equated to a reasonable chance of success.[4] 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.

[24] I am only authorized to consider the grounds of appeal set out in section 58(1) of the DESD Act. I must find that the General Division made an error under one or more of those grounds before I can intervene in a decision of the General Division.[5] To find that the Claimant has a reasonable chance of success on her appeal, I would have to find that there was a reasonable 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.

[25] 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.

[26] The Claimant selected only the third ground of appeal; the one that concerns an erroneous finding of fact. When I wrote to the Claimant to ask why her application was late, I also asked her to explain why she believed the General Division had made an error in its decision. It is clear from her response that she disagreed with the General Division's findings and conclusion, but she did not identify an error in the General Division decision.

[27] In her leave to appeal application, and in her subsequent submissions, the Claimant has disputed the General Division's conclusion that she was not available for work, and she repeated

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

the evidence she gave to the General Division that she applied at a few places and that her COPD prevents her from working in the cold.

[28] She also said that she asked friends and family if they knew of any jobs. However, she did not tell this to the Commission or the General Division, so I cannot consider this evidence. Numerous court decisions have confirmed that the Appeal Division may not consider evidence that was not part of the General Division record.[6]

[29] I understand that the Claimant disagrees with the General Division's findings and conclusion, but simply disagreeing with the General Division findings does not disclose a valid ground of appeal under s. 58(1) of the DESD Act.[7] It is not the role of the Appeal Division to review all the evidence. The Appeal Division can only determine whether the General Division made a natural justice error, erred in law, or based its decision on an erroneous finding of fact.[8]

[30] The Claimant has asserted that the General Division based its decision on an erroneous finding of fact, but she has not identified how any of the General Division's findings are erroneous. The General Division concluded that the Claimant was not available for work. This conclusion was dependent on its findings that she did not have a sincere desire to return to work, that she did not express that desire through her conduct (which would have required that she make reasonable and customary efforts to find work), and that she unduly restricted her job search.

[31] The General Division stated the evidence on which it relied for its findings. I have gone beyond the Claimant's submissions to review the file for any significant evidence that the General Division may have misunderstood or overlooked.[9] However, I have not discovered an arguable case that the General Division made any finding without regard for the evidence, or that it made any finding that was "perverse or capricious"(in other words' its findings appear to be rational, consistent and in accordance with the weight of the evidence).

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[6] *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100; *Tracey v. Canada (Attorney General)*,2015 FC 1300; *Marcia v. Canada (Attorney General)*, 2016 FC 1367; *Parchment v. Canada (Attorney General)*, 2017 FC 354, 2018 FC 277.
[7] *Griffin v. Canada (Attorney General)*, 2016 FC 874.
[8] *El Haddadi v. Canada (Attorney General)*, 2016 FC 482.
[9] See *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

[32] There is no arguable case that the General Division made an error under section 58(1)(c) of the DESD Act by basing its decision on any erroneous finding of fact that was made in a perverse or capricious manner or without regard for the evidence before it. This means that the final *Gattellaro* factor does not favour granting an extension of time.

[33] Three of the four *Gattellaro* factors weigh against granting the extension, and I give particular weight to the final factor relating to the arguable case. I find that it would not be in the interests of justice to allow the late application to proceed.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	H. J., Self-represented