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

Citation: *X. v Canada Employment Insurance Commission and S. S.*, 2019 SST 1413

Tribunal File Number: AD-19-759

BETWEEN:

X

Applicant

and

Canada Employment Insurance Commission

Respondent

and

S. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time: Stephen Bergen

Date of Decision: December 18, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Canada Employment Insurance Commission (Commission) denied S. S.'s (Claimant), application for regular Employment Insurance because it found that she had voluntarily left her employment without just cause. The Commission maintained its decision when the Claimant asked it to reconsider. When the Claimant appealed to the General Division of the Social Security Tribunal, the Applicant, X, (Employer) requested to be added as a party to the proceedings. In a letter dated June 4, 2019, the General Division refused to add the Employer to the appeal. It stated that the Employer did not have a direct interest in the appeal.

[3] On September 20, 2019, the General Division allowed the Claimant's appeal, finding that she had been willing and able to continue working according to a return-to-work plan. Therefore, it decided that she did not voluntarily leave (the "merit decision"). The Applicant appealed to the Appeal Division. It disagreed with the merit decision but also argued that it should not have been denied standing to participate in the General Division process. The Appeal Division determined that the Employer's intention was to appeal the September 20, 2019, merit decision as well as the June 4, 2019, decision. The Appeal Division is reviewing each of these appeals independently. This decision concerns only the Employer's appeal of the June 4, 2019, decision.

[4] The application for leave to appeal of the June 4, 2019, decision is late, and I am denying an extension of time. The Employer has not satisfied me that it had a reasonable explanation for delaying its application for leave, that it had a continuing intention to appeal, that the delay would not unduly prejudice the Claimant, or that there is an arguable case that the General Division made an error in refusing to add the Employer as a party.

PRELIMINARY MATTERS

Was the application for leave to appeal filed late?

[5] On May 10, 2019, the Tribunal wrote to the Employer to ask if it wished to be added as a party to the General Division merit appeal. The letter explained that the Employer must show that it has a direct interest to be added. The Employer responded with a May 23, 2019, letter in which it expressed its intention to participate and explained why it believed it had a direct interest. On May 29, 2019, the Employer authorized the Tribunal to communicate with it by email. The Tribunal emailed its June 4, 2019, decision to the Employer.

[6] 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.

[7] There is no evidence of the date that the decision was actually communicated to the Employer. In such a case, section 19(1)(c) of the *Social Security Tribunal Regulations* (SST Regulations) deems the decision to have been communicated on the day following the day on which it was transmitted. Because the decision is dated June 4, 2019, and was sent by email, I accept that the decision was communicated on June 5, 2019. Therefore, the deadline for filing an application for leave to appeal is July 5, 2019, 30 days from June 5, 2019.

[8] The Employer did not appeal the June 4, 2019, decision until October 17, 2019, when it also appealed the General Division merit decision.

[9] The application for leave to appeal the June 4, 2019, decision is late by just over three months.

ANALYSIS

General Principles

[10] The Appeal Division has the discretion to allow an applicant to file an application for leave to appeal beyond the 30-day deadline.[1] While this decision is within the Appeal Division's

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[1] Section 57(2) of the *Department of Employment and Social Development Act*

discretion, the Federal Court of Appeal requires the Appeal Division to consider certain factors in the exercise of that discretion.[2] These factors (referred to as the *Gattellaro* factors) are as follows:

- The applicant demonstrates a continuing intention to pursue the appeal;
- There is a reasonable explanation for the delay;
- There is no prejudice to the other party in allowing the extension; and
- The matter discloses an arguable case.

[11] The weight that the Appeal Division may give to each of the above factors differs from one case to another and, in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served.[3]

Should I exercise my discretion to grant an extension of time to file the leave to appeal application?

I. <u>Continuing intention to appeal</u>

[12] The intention with which we are concerned is the intention to appeal the General Division`s decision to deny the Employer standing. The Employer argued that it did not appeal the June 4, 2019, decision because it believed that it could still appeal the General Division merit decision, if it disagreed with that decision. The Employer repeated its objection to the General Division's refusal to add it as a party when it filed the Notice of Appeal of the merit decision.

[13] In other words, the Employer had no intention to take any action in relation to the June 4, 2019, decision until he received the General Division merit decision. The Employer could have appealed the June 4, 2019, decision but chose to wait, and to pursue its case by appealing the merit decision if that became necessary. The Employer may have had a continuing intention to dispute the Claimant`s appeal on its merits, but the refusal to add the Employer as a party was a separate decision.

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[2] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883; *Muckenheim v Canada (Employment Insurance Commission)*, 2008 FCA 249.
[3] *Canada (Attorney General) v Larkman*, 2012 FCA 204.

[14] I find that the Employer did not have a continuing intention to appeal the June 4, 2019, decision. This factor weighs against allowing the extension of time application.

II. Reasonable explanation for the delay

[15] The June 4, 2019, decision includes information on how the decision may be appealed and the deadline for doing so. The Employer has not argued that it was unaware of its right to appeal the June 4, 2019, decision. Instead, the Employer explained that it delayed its application for leave to appeal because it believed it had the ability to appeal the General Division merit decision. In essence, the Employer now believes it misunderstood the strategic implication of failing to do appeal the decision.

[16] The Employer made a choice to follow one legal avenue and to abandon another. However, nothing forced the Employer to this choice. It could have pursued both avenues. No matter the result of an appeal of the June 4, 2019, decision, the Employer would have been in no worse position to attempt an appeal of the General Division merit decision.

[17] In these circumstances, I do not accept that the Employer's explanation was reasonable. The Employer demonstrated that it was capable of responding to the General Division's invitation when the Employer requested to be added as a party. When the Employer received the June 4, 2019, denial, the Employer was likely just as capable of obtaining information or advice before deciding he did not need to appeal this decision. This would have been prudent. The June 4, 2019 decision included appeal information that should have put the Employer on notice that its interests could be affected by the General Division's refusal to add the Employer as a party. The Employer ignored the June 4, 2019, decision based only on a hope that the merit decision would ultimately support its own position, and a presumption that it could appeal the merit decision if it was unfavourable.

[18] This factor weighs against allowing the extension of time application.

III. Prejudice to the other party

[19] The Employer claims that there is no prejudice to the Claimant because she will still be able to provide submissions. In the alternative, the Employer argues that it will be prejudiced if the late appeal is not allowed to proceed.

[20] The Claimant argues that she has already expended considerable time and resources in advancing the appeal. She also argues that the Employer had the opportunity to participate and chose not to, and that it would be unfair to allow the Employer to become involved just because it does not like the General Division result.

[21] I note that the Claimant is now represented by counsel who has provided submissions on her behalf. I have no doubt that that the Claimant has expended considerable resources. She obtained a favourable decision from the General Division months after it refused to add the Employer and the Employer failed to appeal. If the extension of time and leave to appeal were both allowed, the Claimant would likely be required to expend even more time and money. A further appeal or appeals will require additional submissions, and perhaps her appearance at a hearing. If I then found that the General Division made an error to deny the Employer standing, this would potentially affect the General Division merit decision or the process at the Appeal Division on the Employer's appeal of the merit decision. All of this would involve increased cost, inconvenience, uncertainty, and stress for the Claimant.

[22] It is the Employer who failed to appeal the General Division decision on time, and I must therefore consider the prejudice to the other parties of granting the Employer an extension of time. *Gattellaro* does not require that I balance the prejudice to the Employer that could result from not granting the extension, against the prejudice to the other parties if I do grant the extension.

[23] However, *Gattellaro* does not prevent me from taking other circumstances into account. The Employer made the argument that the General Division's refusal to allow it to participate in the General Division appeal, caused or contributed to the General Division's findings and conclusion. It argued that the Claimant has raised a res judicata argument in civil action before the BC Supreme Court and that the Employer is now prejudiced because it must defend against that argument.

[24] The only *actual* prejudice is the Employer's stated need to respond to an argument. However, he presumably expects to have to do so because of some additional prospect of prejudice if the *res judicata* argument were to be successful. The Claimant's *res judicata* argument was apparently made in a wrongful dismissal action filed in the BC Supreme Court. The BC Supreme Court will apply its own rules, consider different issues, and apply a different legal test. Whatever the merits of the *res judicata* argument, the Employer apparently intends to defend itself in that proceeding. In my view, the expense or inconvenience involved in responding to this particular argument is inconsequential relative to the prejudice to the Claimant. The Employer has not suggested that the *res judicata* argument is likely to be successful - understandably. However, I refuse to speculate on the potential prejudice that is contingent on the Claimant succeeding with her human rights complaint based on a *res judicata* argument. I give very little weight to any actual or prospective prejudice to the Employer.

[25] I find that there would be significant prejudice to the Claimant if the extension of time were granted.

IV. Arguable case

[26] 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.

[27] For the application for leave to appeal to succeed, I would have to find that there is a "reasonable chance of success" on one or more of the "grounds of appeal" found in the law. A reasonable chance of success means that there is a case that the Claimant could argue and possibly win.

[28] "Grounds of appeal" means reasons for appealing. I am only allowed to consider whether the General Division made one of these types of errors:[5]

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[4] This is explained in a case called *Canada (Minister of Human Resources Development) v Hogervorst*, 2007, FCA 41; and in *Ingram v Canada (Attorney General),* 2017 FC 259.

[5] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act.*

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

Unfairness

[29] The decision in this appeal is the decision to deny the Employer standing. The General Division is required to determine whether a person should be added as a party based on whether that person has a "direct interest" in the proceedings.[6] The General Division found that the Employer did not have a direct interest. The Employer cannot claim that he was unfairly excluded from a process in which it has no direct interest.

[30] However, the General Division must act fairly to the Employer when it decides whether the Employer has a direct interest. In this case, the Tribunal's procedure was as follows:

1. It asked the Employer if it wanted to be added as a party;
2. It told the Employer that it needed to show it had a direct interest to be added;
3. It gave the employer the opportunity to make submissions on whether it had a direct interest;
4. It considered the Employer's submissions;
5. It communicated its decision to the employer and stated its reasons; and,
6. It informed the Employer of its appeal rights and deadline.

[31] The Employer chose not to exercise its right of appeal. There is no arguable case that the General Division acted unfairly.

Application of case law to interpret "direct interest"

[32] The Employer claims that the General Division misinterpreted the case law when it found that the Employer did not have a direct interest. To help define "direct interest", the General

[6] Section 10 of the Soc*ial Security Tribunal Regulations*

Division cited *Forest Ethics Advocacy Association v Canada (National Energy Board).*[7] The General Division supported its definition with a reference to *Amon v Rahpael Tuck & Sons Ltd.*[8], another case that relates to when a party should be added.

[33] According to the Employer, *Forest Ethics* deals with the test for whether a party is "directly affected", which is a different test than "direct interest" under section 10 of the SST Regulations. The Employer likewise argues that *Amon* was not concerned with the test under section 10(1).

[34] "Direct interest" is not defined in the DESD Act or the SST Regulations. The Employer has not directed me to any case in which the Federal Court or Federal Court of Appeal has interpreted "direct interest" for the purpose of adding a party under section 10 of the SST Regulations. I am not aware of any.

[35] In the absence of a specific legislative or judicial definition of "direct interest", the General Division turned to other court decisions that have considered under what circumstances a part should be added. This included the *Forest Ethics* case which interpreted a Federal Court rule that would permit a party to be added if the party was "directly affected". The Employer suggests that this is a different test, but the Federal Court of Appeal actually used the term "directly affected" interchangeably with "direct interest", suggesting that it did not see any meaningful distinction.[9]

[36] There is no arguable case that the General Division erred in law by using case law outside of the section 10(1) context for the purpose of assisting it to interpret "direct interest". The Employer did not show how the definition employed by the General Division was inconsistent with legal authority or contrary to the purposes of the DESD Act or SST Regulations. Neither did the Employer propose a more reasonable interpretation of direct interest. Instead, the Employer argues that all employers must be presumed to have a direct interest, or; all employers who request to be added parties must have a direct interest, no matter what "direct interest" may be.

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[7] *Forest Ethics Advocacy Association v Canada (National Energy Board),* 2013 FCA 236
[8] *Amon v Rahpael Tuck & Sons Ltd.* (1955), [1956] All E.R. 273 (Eng. Q.B.)
[9] Supra note 8, para 19, 20

Consistency with other decisions of the General Division

[37] The Employer provided a list of General Division decisions that it obtained by searching for references to section 10(1) of the SST Regulations, The Employer discovered that the General Division allowed employers to be added as parties in all, or virtually all, of its other decisions in which an employer made this request. According to the Employer, this means that the Tribunal must assume that employers have a direct interest in appeals, or that the Tribunal assumes a direct interest where employers apply to be added. In the Employer's view, it would be an error of law not to follow the example of these other decisions.

[38] However, the General Division does not add a person as a party as a matter of policy or practice. Section 10(1) of the SST Regulations requires the General Division to be satisfied on the facts that the applicant has a direct interest, and to make a judicial determination. There is no legal authority for the notion that the General Division may just assume that employers as a class of applicants have a direct interest, or that those employers that seek to be added should be added.

[39] Furthermore, the decisions in the Employer's search do not support such a notion. In some of the General Division decisions in the Employer's search, the employer was added as a party on the General Division's own initiative. This means that the General Division was satisfied that the employer had a direct interest even though the employer did not express an interest. In other cases, as noted by the Employer, the General Division determined that the employer did not have a direct interest even after the employer failed to respond to the General Division's invitation to make submissions. In other words, the various General Division decisions do not suggest that it will decide a person has a direct interest only because that person is the employer. They also do not suggest that the General Division will accept an employer as a party because the employer makes the application.

[40] In each of the decisions cited by the Employer (in which the employer was added as a party), the decision to add the employer was an interlocutory decision that was made prior to the

published decision. None of the decisions in the Employer's search results reveal the arguments or the facts on which the General Division found the employer to have a direct interest.[10]

[41] The General Division is not bound to follow other decisions of the General Division. However, I accept that the General Division should have good reasons for departing from an established interpretation. In this case, the Employer's search results do not make out an arguable case that the General Division departed from any generally accepted interpretation.

[42] I find that there is no arguable case that the General Division erred in law in its use of judicial authority. I also find that there is no arguable case that the General Division ought to have added the employer in this case because the employer was added in a number of other General Division decisions.

Finding of fact that the Employer had no direct interest

[43] The Employer points to its statement before the General Division that it had gone "to great lengths to accommodate [the Claimant]". The Employer states that the General Division the General Division "ought to have been aware that other legal proceedings were underway", and that its finding that the Employer had no direct interest was "unreasonable".

[44] The Employer appears to be arguing that its direct interest in the Claimant's Employment Insurance appeal is that the General Division decision could affect its other legal proceedings. The Employer states that the Claimant has now made a "res judicata" argument since the September 20, 2019, merit decision, and that it is now required to answer this argument in those other legal proceedings.

[45] It is not my role to assess the "reasonableness" of the General Division's decision. The Employer could only be successful in his appeal if he could establish one of the grounds of appeal described in section 58(1) of the DESD Act. So far as the General Division's findings of fact, this would mean that the Employer would have to show that the General Division based its

[10] With the possible exception of *M.R. v. Canada Employment Insurance Commission and X Hotel Inc.* which briefly notes that the employer was added because "the claimant and the employer provided conflicting information".

decision on a finding of fact that ignored or misunderstood relevant and significant evidence, or that the finding was so inconsistent with the evidence as to be "perverse or capricious".

[46] The General Division found that the Employer's statement that it had made efforts to accommodate the Claimant show that it was concerned about the Claimant's evidence and the appeal outcome. However, it found no evidence that its decision would impose a legal obligation on the Employer or bind it in some way, or directly prejudice the Employer.

[47] The Employer did not point to any evidence that the General Division ignored, but it argues that the General Division misunderstood the implications of the Employer's statement when it found that the Employer did not have a direct interest.

[48] The Employer's submission to the General Division was very brief. It said only that it had made efforts to accommodate the Claimant. The Employer is suggesting that the General Division's should have inferred that the Claimant was pursuing or would pursue a human rights remedy in another forum. In addition, the Employer suggests that the General Division should have anticipated that the Claimant might (if ultimately successful in her Employment Insurance appeal), attempt to use that decision to found a *res judicata* argument in the human rights forum, and that the Employer would need to answer that argument.

[49] In my view, it is a far reach to assert that the General Division ought to understood that the Employer had a "direct interest" from that brief statement.

[50] There is no arguable case that the General Division ignored or failed to appreciate the Employer's evidence or that its decision is perverse or capricious.

[51] The Employer has no arguable case that the General Division erred under any of the grounds set out in section 58(1) of the DESD Act. This final factor also weighs against allowing the appeal to proceed.

<u>Summary of *Gattellaro* factors</u>

[52] None of the four *Gattellaro* factors weigh in favour of allowing the extension of time, and the Claimant's inability to make out an arguable case is among them. I must place great

weight on the "arguable case" factor since that finding is essentially the same as the finding I would have to make if I were to grant leave.

[53] Even so, I assign greater weight to the first three *Gattellaro* factors than I would give to the "arguable case" factor, if it were taken alone. The Employer was aware that it could appeal the refusal to add it as a party and of the timeline, but it made a choice to wait on the merit decision. The Employer now wishes to revisit that choice because it does not agree with the merit decision and is concerned it may have some difficulty appealing that decision. However, allowing the leave to appeal to proceed would involve significant prejudice to the Claimant, including renewed uncertainty as to the ultimate decision and her ability to retain the Employment Insurance benefits that she has received.

[54] My findings on the first three *Gattellaro* factors would have satisfied me that it was not in the interests of justice to allow the extension of time, even if I had found that the Employer had an arguable case.

CONCLUSION

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

[56] The Employer may expect that the question of whether it is a "subject of the decision" will be a preliminary issue in its other appeal of the merit decision. Only "the subject of the decision", may appeal a General Division decision to the Appeal Division.[11] This is not the same test as the "direct interest" test that the General Division employed when it refused to add the Employer as a party to the Claimant's appeal.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	B. G., for the Applicant, X Kirsten Hildebrandt, for the Added Party, S. S.

[11] Section 55 of the DESD Act.