



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. C. v Canada Employment Insurance Commission*, 2020 SST 40

Tribunal File Number: AD-20-29

BETWEEN:

G. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: January 22, 2020

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, G. C. (Claimant), is seeking leave to appeal the General Division's decision. Leave to appeal is the first step of the appeals process. It means that an applicant has to get permission from the Appeal Division before they can move on to the next and final stage of the appeals process.

[3] The General Division determined that the Respondent, the Canada Employment Insurance Commission (Commission) had exercised its discretion judicially when it denied the Claimant's request in September 2019 for an extension of time to reconsider its decision.¹ The Claimant had to ask for an extension of time because he was already late when he asked the Commission to reconsider its decision of November 21, 2017.²

[4] At this stage of the appeals process, I have to decide whether the appeal has a reasonable chance of success. The Claimant argues that the General Division overlooked information when it made its decision.

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

ISSUE

[6] The issue before me is whether there is an arguable case that the General Division overlooked important information.

¹ See Claimant's Request for Reconsideration, at GD3-15 to GD3-19.

² See Commission's letter of November 21, 2017, at GD3-12.

ANALYSIS

[7] 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 types of errors listed in subsection 58(1) of the *Department of Employment and Social Development Act*. The appeal has to have a reasonable chance of success. This is the same thing as an arguable case at law.³ The types of errors are whether:

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

[8] At the leave to appeal stage, claimants do not have to prove their case. They simply have to show that there is an arguable case.

The General Division decision

[9] The General Division had to decide whether the Claimant was late. If so, then it also had to decide whether the Commission had exercised its discretion judicially when it refused the Claimant's request for an extension of time to seek a reconsideration of its decision.

[10] If the General Division had determined that the Commission had exercised its discretion judicially, that would have ended the matter. The General Division would have had no basis or any authority to intervene in the Commission's decision denying the request. There would have been no basis for the General Division to make its own determination on whether it should extend the time for filing. Indeed, the General Division acknowledged this at paragraph 14, when it wrote:

³ This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

The Commission's decision can only be varied if the Commission did not exercise this discretionary power judicially. The Tribunal can only interfere with the Commission's decision to refuse the extension of time to make the reconsideration request if the Commission failed to exercise its discretion judicially.

[11] If the Commission had not acted judicially, then the General Division was required to intervene. It would have had to decide for itself whether it was appropriate to grant an extension.

[12] The Claimant agreed that he was late when he asked the Commission to reconsider its decision. The General Division then turned its focus on whether the Commission exercised its discretion judicially. The General Division correctly noted that the *Reconsideration Request Regulations* applied.⁴

[13] Under the *Reconsideration Request Regulations*, the Commission has to be satisfied that the Claimant had a reasonable explanation for the delay. It also had to be satisfied that he had a continuing intention to request the reconsideration throughout the period of delay.

[14] When a claimant makes their request more than 365 days after they receive the Commission's initial decision, the Commission has to be satisfied of two other circumstances. The first is whether the request for reconsideration has a reasonable chance of success. The second is whether there would be any prejudice to the Commission or to another party if the Commission were to grant an extension.

[15] Here, the Claimant's request was more than 365 days after he received the Commission's initial decision of November 21, 2017. Because of this, the Commission had to be satisfied that the Claimant met all four factors, rather than just two factors. If the Commission was not satisfied that the Claimant met all four factors, then the Commission would have no authority to give the Claimant a longer period to request a reconsideration. In short, if the Claimant missed even just one factor, he would be out of luck.

[16] The General Division found that the Commission had examined the four factors. This included whether the Claimant had a reasonable explanation for his delay.

⁴ See General Division decision, at paras. 15 and 16, and subsections 1(1) and (2) of the *Reconsideration Request Regulations*.

[17] The General Division also examined whether the Commission might have acted in bad faith, acted for an improper purpose or motive, took into account an irrelevant fact, or ignored a relevant fact.⁵

[18] Having examined the four factors and these other consideration, the General Division should have stopped there and ended its enquiry.

Claimant's explanation for the delay

[19] The General Division found that the Commission accepted the Claimant's medical excuse.⁶ However, the General Division conducted its own analysis. It considered the submissions from both parties, as well as the Claimant's evidence. Ultimately the General Division disagreed with the Commission. Unlike the Commission, the General Division found that the Claimant's medical condition did not delay him from asking the Commission to reconsider its decision.

[20] Although the General Division had to be satisfied that the Claimant met all four factors, this did not mean that the General Division had to conduct its own assessment for each of those factors. For this reason, there is an arguable case that the General Division exceeded its jurisdiction when it decided whether the Claimant's medical condition delayed him from asking the Commission to reconsider its decision.

Other factors for the delay

[21] The General Division also assessed whether the Claimant had a continuing intention to ask the Commission to reconsider its decision. It should have left that assessment to the Commission. This too raises an arguable case that the General Division exceeded its jurisdiction. Arguably, it made an unwarranted assessment.

[22] The General Division felt it was unnecessary to examine the remaining two factors.

⁵ General Division decision, at para. 14.

⁶ General Division decision, at para. 18.

Is there an arguable case that the General Division exceeded its jurisdiction?

[23] The General Division may have exceeded its jurisdiction. It decided an issue that it did not have to decide. It conducted its own assessment on two of the factors.

[24] But, while the General Division assessed two of the factors, it did not change the outcome in any way.

[25] Instead, what was critical was whether the General Division had in fact examined whether the Commission had acted judicially. The General Division simply had to look at whether the Commission examined the four factors. It would have also required the General Division to examine whether the Commission had acted in bad faith, had acted for an improper purpose or motive, had taken into account an irrelevant fact, or had ignored a relevant fact.

[26] As I noted above, the General Division found that the Commission examined the four factors.⁷ There is no suggestion that the General Division failed to examine whether the Commission might have acted in bad faith, acted for an improper purpose or motive, or took into account an irrelevant fact. However, the Claimant suggests that the General Division failed to examine whether the Commission ignored relevant facts, when it considered whether he had a reasonable explanation for his delay.

Is there an arguable case that the General Division ignored some of the facts?

[27] The Claimant argues that the General Division failed to consider several facts. These include the full history of his medical problems, the side effects of his medications, losing his home which provided him with income, being evicted from his home, losing his driver's licence because of unpaid fines, and losing friends because of his medical conditions. The Claimant says that he has had a difficult time coping with life with all of these problems. He is unable to maintain his concentration.

[28] However, unless the Commission had failed to act judicially, it was not open to the General Division to conduct its own assessment and consider these facts.

⁷ See General Division decision, at para. 18.

[29] At the same time, having listened to the audio recording, I do not see that there was any evidence of most of these problems, either before the General Division or the Commission, for that matter. The Claimant simply did not mention the bulk of these issues before the Commission or the General Division, other than his medical conditions.

[30] There was no evidence regarding the Claimant's loss of his home, driver's licence, or friends, and how these losses affected him. Therefore, the Commission could not have overlooked evidence that it did not have. Similarly, the General Division could not have failed to examine whether the Commission overlooked this evidence.

[31] There was some evidence before the Commission that the Claimant had medical issues that delayed him from asking for a reconsideration. This evidence was set out in the Claimant's request for reconsideration.⁸ The Claimant said that he was late primarily because of his congestive heart failure and anxiety.

[32] In its Record of Decision,⁹ the Commission acknowledged the Claimant's health issues. The Commission noted that the Claimant would feel unwell, anxious, and overwhelmed anytime he looked at the paperwork. The Commission accepted the Claimant's explanation for the delay. It found that the Claimant had provided a reasonable explanation as his "anxiety was so severe it prevented him from addressing the issue and that his health condition and disabilities made it more difficult."¹⁰

[33] The General Division conducted a brief analysis as to whether the Commission considered the various factors, including the Claimant's explanation for the delay. At paragraphs 18 and 32, the General Division acknowledged that the Commission had considered the Claimant's explanation and that it found it reasonable. The General Division did not fully set out the basis upon which the Commission found the Claimant's explanation reasonable. This was unnecessary, in light of the fact that the Commission was satisfied with the explanation.

⁸ See Schedule A to request for reconsideration, at GD3-17.

⁹ See Record of Decision, dated October 18, 2019, at GD3-21.

¹⁰ *Ibid.*

[34] For this reason, I am not satisfied that there is an arguable case that the General Division failed to consider whether the Commission looked at the Claimant`s medical issues.

[35] As a footnote, it was inappropriate for the General Division member to substitute his own assessment in place of the Commission`s on this issue. After all, it was sufficient for the General Division to examine whether the Commission considered the various factors, taking into account all of the evidence, including the Claimant`s medical evidence. The General Division stated that it had considered the four factors. And, at paragraph 44, it also noted that it could not find any evidence that the Commission had acted in bad faith, acted with an improper purpose or motive, took into account an irrelevant factor, ignored a relevant factor, or acted in a discriminatory manner.

[36] Even if the General Division went overboard in conducting its own assessment on two of the factors (after having found that the Commission had acted judicially), ultimately it properly examined whether the Commission exercised its discretion judicially. It concluded that the Commission had acted judicially. Given this, it would be inappropriate for me to conduct my own assessment and substitute it in the place of the Commission`s assessment.

Is there an arguable case that the General Division process was unfair?

[37] The Claimant also argues that the General Division denied him the opportunity to present evidence at the hearing. He wanted to testify about some of his problems.

[38] I have listened to the audio recording. The General Division member gave the Claimant a full opportunity to present his case. The member let him fully testify. The member concluded the hearing by asking the Claimant whether there was anything the Claimant wished to add before he closed the hearing. The member let him answer.¹¹ At no time during the hearing did the member cut off the Claimant or tell him that he could not speak about an issue.

[39] The member also encouraged the Claimant to file any documents after the hearing. The member suggested to the Claimant that he approach a Service Canada agent to send documents to the Tribunal on the Claimant`s behalf. The Tribunal accepted documents from the Claimant

¹¹ At approximately 36:30 of the General Division hearing.

after the hearing.¹² The document included a medical report from the Claimant's family physician, prepared on November 2, 2017. The document also included x-rays of the Claimant's left foot and two ribs. The x-rays were taken on November 12, 2017.

[40] The General Division considered the documents that the Claimant filed after the hearing. The member noted that the family physician was of the opinion that the Claimant "[would] not be able to function at workplace in any capacity."¹³

[41] Clearly, the General Division ensured that the process was fair. The member gave the Claimant a full chance to present his case. The member considered the Claimant's testimony and the various records. As such, I am not satisfied that there is an arguable case that the General Division process was unfair.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	G. C., Self-represented
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¹² See document GD5.

¹³ See General Division decision at para. 24 and at GD5-4. The General Division referred to the document as GD6, but this was likely a typographical error as there is no GD6 on file.