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

Citation: *J. A. v Canada Employment Insurance Commission*, 2020 SST 348

Tribunal File Number: AD-20-120

BETWEEN:

J. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time and Leave to Appeal by: Janet Lew

Date of Decision: April 22, 2020

DECISION AND REASONS

DECISION

[1] An extension of time to apply for leave to appeal is refused because the appeal does not have a reasonable chance of success.

[2] Leave to appeal is also refused for the same reason.

OVERVIEW

[3] The Applicant, J. A. (Claimant), is seeking leave to appeal the General Division's decision. Leave to appeal means that applicants have to get permission from the Appeal Division. Applicants have to get this permission before they can move on to the next stage of the appeal process. Applicants have to show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.

[4] The General Division found that the Claimant lost his job because of misconduct. This disqualified the Claimant from receiving Employment Insurance benefits.

[5] The Claimant argues that the General Division made several mistakes. He argues that it should have looked into his work history. He also argues that the General Division should have made his employer attend the hearing and testify under oath. He says that this would have revealed that the issue over the time he took for vacation masked the employer's real reason it dismissed him. The Claimant further argues that the General Division should have placed more weight on his sworn evidence rather than on the unsworn evidence of his employer. Finally, he argues that the General Division overlooked key pieces of evidence, including the real reasons his employer dismissed him.

[6] Before I can consider whether to grant leave to appeal, first, I have to decide whether the Claimant filed his application for leave to appeal with the Appeal Division on time. If he did not file his application on time, then I have to decide whether the law will let me extend the deadline for filing the Claimant's application for leave to appeal with the Appeal Division. However, if the appeal does not have a reasonable chance of success, there would no justification for granting an extension of time or, for that matter, for granting leave to appeal.

[7] I find that the Claimant was late when he filed his application requesting leave to appeal. An extension of time and leave to appeal is refused because the appeal does not have a reasonable chance of success.

ISSUES

[8] The issues are:

Issue 1: Did the Claimant file his application to the Appeal Division on time?

Issue 2: If not, should I extend the deadline for filing the application?

Issue 3: If I extend the deadline, does the appeal have a reasonable chance of success?

ANALYSIS

Issue 1: Did the Claimant file his application to the Appeal Division on time?

[9] No. The Claimant did not file his application on time.

[10] The Claimant does not say when he received the General Division's decision, but he had to file an application to the Appeal Division within 30 days after the day on which he received the General Division's decision.[1] The Social Security Tribunal sent a copy of the General Division's decision to the Claimant by email on November 22, 2019. One assumes that he received the General Division's decision on the next business day, on November 25, 2019.[2]

[11] Because the Claimant is deemed to have received the General Division's decision on November 23, 2019, the Claimant had until December 27, 2019, to file an application to the Appeal Division.

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[1] See section 57(1)(a) of the DESDA.
[2] Under section 19(1)(c) of the *Social Security Tribunal Regulations*, for General Division decisions sent by email, they are deemed to have been communicated the next business day after the day on which the Social Security sent them.

[12] The Claimant phoned the Tribunal on January 29, 2020. According to phone log notes, he told the Tribunal that he did not know he had an option to appeal his decision. He asked for an application form. The Tribunal mailed him an application form. However, he did not file an application to the Appeal Division until February 24, 2020. By then, he was more than 60 days late.

Issue 2: Should I extend the deadline for filing the appeal?

[13] No. The deadline for filing the appeal should not be extended because the Claimant does not have an arguable case on appeal.

[14] I have some discretion to give a party more time to file an application to the Appeal Division. In deciding whether to grant an extension of time to file an application for leave to appeal, the Federal Court of Appeal has said that the overriding factor to consider is the interests of justice.[3] The Federal Court of Appeal has also listed other factors to consider:

- there is an arguable case on appeal or some potential merit to the application;
- there are special circumstances or a reasonable explanation for the delay;
- the delay is excessive;
- the respondent will be prejudiced if the extension is granted; and
- the party had a continuing intention to pursue the application.

[15] The delay involved here is not that long. The Commission is unlikely to face any prejudice if I were to grant an extension.

[16] The Claimant was late because he relied on his former representative who apparently did not tell him about the appeals process. The Claimant claims that he did not know that he could appeal until after he retrieved his file from his representative. He also contacted the Tribunal two months after he received the General Division's decision. After learning that he had the chance

[3] See *X (Re)*, 2014 FCA 249; *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

to appeal the General Division's decision, about another month passed before the Claimant filed an application with the Appeal Division. This does not show that the Claimant acted in a timely manner to pursue an appeal. In other words, it does not show a continuing intention to file an appeal or reasonably excuse his delay.

[17] Even so, the fact that the Claimant has not met one of the factors does not prevent me from granting an extension of time. In determining whether it is in the interests of justice to extend the time for filing, generally I assign greater weight to whether there is an arguable case, in the absence of any other special circumstances.

[18] This means a claimant simply has to show that there was one of the types of errors listed in section 58(1) of the *Department of Employment and Social Development Act* (DESDA). The types of errors are:

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.

The Claimant argues that the General Division made these types of errors.

(a) Whether there is an arguable case on appeal

[19] The Claimant argues that the process at the General Division was unfair because the General Division failed to investigate his work history or his employer's real motives for dismissing him. The Claimant also argues that the General Division failed to make his employer attend the hearing to give sworn evidence, and then it exacerbated its failure by preferring his employer's unsworn statements over his sworn testimony. Finally, the Claimant argues that the General Division failed to consider key pieces of evidence.

- **Investigation into work history and employer's motives for dismissal**

[20] The Claimant argues that the General Division should have looked into his work history because it would have then learned that he was a good employee and that there had never been any complaints against him. That way, it would have found him a credible witness and would have accepted his evidence over his employer's evidence. He claims that the General Division would have accepted his evidence that his employer had verbally approved a four-week leave of absence.

[21] The Claimant also argues that the General Division should have looked into his employer's motives. Had it done so, he claims that it would have realized that the real reason it dismissed him was unrelated to his unauthorized extended leave of absence or any allegations of misconduct. The Claimant argues that if there was any misconduct, it did not lead to his dismissal, so he should not have been disqualified from receiving Employment Insurance benefits.

[22] However, the General Division does not perform an investigative role. As an impartial and independent decision-maker, the General Division must remain fully independent of the parties and must operate at arm's length. It does not conduct any investigations on behalf of any of the parties.

[23] If the Claimant wanted to rely on any evidence, it was up to him to get that evidence and to present it. In any event, the General Division was able to assess the Claimant's credibility through other means, such as whether the Claimant's testimony was reliable and consistent with the overall evidence, and whether it had the "ring of truth."

[24] The General Division accepted the Claimant's evidence that he asked his employer for time off work. However, the General Division did not accept the Claimant's claim that his employer verbally agreed that he could take four weeks off work.

- There was no supporting documents that showed the employer gave its approval for the Claimant to take four weeks off work
- The employer told the Commission that the Claimant asked for time off, but he never told them how much time he wanted or when he would be away. In past, the Claimant had only ever taken "a day here or there." In other words, the General

Division seems to have concluded that the employer might have been left with the impression that the Claimant would not be away for very long

- It was company policy that employees were entitled to no more than two weeks of vacation, according to the employee handbook referred to by the employer[4]

[25] It may be that the Claimant asked for four weeks and that the employer verbally approved or the Claimant understood that the employer approved this request. However, short of any supporting documentation of this, and given the history and the fact that the Claimant was limited to two weeks' vacation, the General Division was entitled to prefer the employer's position that it had authorized only two weeks of vacation.

[26] It was up to the Claimant to produce any supporting evidence to prove his case. That did not fall on the General Division. This also applied in the case where the Claimant argued that his employer had other reasons to dismiss him.

[27] The General Division considered the Claimant's claims that the employer had other motives to dismiss him. Again, there was insufficient evidence to show that the employer had other motives behind dismissing the Claimant. It was not up to the General Division to try to get any evidence about any motives that the employer might have had.

[28] I am not satisfied that the Claimant has an arguable case that the General Division failed to conduct any investigations into his work history.

Weight of evidence and employer's evidence

[29] The Claimant suggests that the process was unfair because the General Division should have assigned more weight to his sworn testimony over the unsworn statements of his employer. He also suggests that his employer should have had to give evidence under oath.

[30] The General Division does not have any authority to compel a witness to attend a hearing to give evidence under oath. The General Division can only rely on the evidence before it. This

[4] See employer's letter dated February 19, 2019, at GD3-31.

means that it is important for claimants to obtain and produce whatever evidence they need to prove their case.

[31] The issue of the weight to be assigned does not fall within any of the grounds of appeal under section 58(1) of the DESDA. The matter of the assignment of weight lies with the General Division as the trier of fact. I am not satisfied that there is an arguable case over the weight that the General Division placed on the evidence.

Evidence the Claimant argues was overlooked

[32] The Claimant also argues that the General Division overlooked and should have accepted his evidence that his employer never told him he could face dismissal. He denies any misconduct because he did not know that dismissal was a possibility if he was off work for four weeks instead of two weeks.

[33] The Claimant had a meeting with his employer. During this meeting, he asked for time off. The Claimant maintains that his employer never told him that he could face dismissal if he took more than two weeks of leave. In fact, he maintains that his employer agreed to his request for four weeks off work.

[34] The General Division was aware of the Claimant's claims that he did not know he could face dismissal if he did not return to work after two weeks. The General Division rejected the Claimant's claims. It found the employer's statements more credible.

[35] Besides, the General Division found that even if the employer did not verbally tell the Claimant that he could face dismissal, the employer certainly told him in writing.

[36] The Claimant had filled out a Vacation or Absence Request Form on February 15, 2019.[5] He asked to be away from February 26, 2019 to March 30, 2019. The employer responded on February 19, 2019. It wrote:

> To restate, you are eligible for two (2) weeks' vacation as per Company policy outlined in our employee handbook.

[5] See Vacation or Absence Request Form, dated February 15, 2019, at GD3-30.

> Due to the nature of the business, and the number of staff available …, approving an extended leave puts the Company in a position of having to hire an employee to step into this position. As a result, we are not in a position to approve this leave of absence.
>
> The purpose of this letter is to inform you that we approve (2) weeks vacation, and have modified duties available for you as of March 12, 2019.
>
> In the event you fail to return to work by March 12, 2019, we acknowledge you have abandoned you [*sic*] position and effectively resigning your employment … [6]

[37] From this, the General Division found that the Claimant certainly had to have known that dismissal was a possibility if he did not return to work after two weeks. I am not satisfied that there is an arguable case that the General Division overlooked the Claimant's claims that he could not have been aware that dismissal was a possibility if he was away from work for more than two weeks.

[38] As I find that the appeal does not have a reasonable chance of success, I do not see any compelling reason to give the Claimant an extension of time to file an application to the Appeal Division.

Issue 3: Does the appeal have a reasonable chance of success?

[39] I have already decided above that the appeal does not have a reasonable chance of success. Because of this, I am also refusing leave to appeal.

CONCLUSION

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

[41] Leave to appeal is also refused.

Janet Lew
Member, Appeal Division

[6] See employer's letter dated February 19, 2019, at GD3-31.

REPRESENTATIVE:	J. A., Self-represented