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

Citation: *N. D. v Canada Employment Insurance Commission*, 2020 SST 425

Tribunal File Number: AD-20-635

BETWEEN:

N. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: May 19, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused because the appeal does not have a reasonable chance of success.

OVERVIEW

[2] The Applicant, N. D. (Claimant), seeks 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.[1]

[3] The General Division found that the Claimant failed to bring her appeal to the General Division on time. The Claimant wanted to appeal the reconsideration decision of the Respondent, the Canada Employment Insurance Commission (Commission). Because she was late in filing her appeal, the General Division decided that it could not go ahead with the appeal.

[4] The Claimant argues that the General Division made a factual error in its decision. The Claimant alleges that the General Division found that she left her job for "personal reasons." She claims that the evidence showed that she left her job because of workplace bullying and harassment. She argues that the harassment resulted in a deep depression. She took various medications but she experienced side-effects, which affected her daily functioning. As a result, she missed the one-year deadline to appeal to the General Division. She suggests that the General Division should have also considered how her health problems affected her ability to bring an appeal on time.

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

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

ISSUE

[6] Is there an arguable case that the General Division based its decision on important errors of fact about why she left her job and why she was late when she brought her appeal to the General Division?

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 section 58(1) of the *Department of Employment and Social Development Act* (DESDA). These errors would be where the General Division:

(a) Did not allow for a fair process.

(b) Did not decide an issue that it should have decided, or it decided something that it did not have the power to decide.

(c) Made an error of law when making a decision.

(d) Based its decision on an important error of fact.[2]

[8] The appeal also has to have a reasonable chance of success. This is a relatively low bar because claimants do not have to prove their case at this stage of the appeals process.

[9] The Claimant argues that the General Division made two important errors of fact. However, it is not enough for an important error of fact to exist. The General Division had to have made it in a perverse or capricious manner or without regard for the material before it. The General Division also had to have based its overall decision on the erroneous finding of fact.

[10] The Claimant argues that the General Division made an important error of fact when it found that she left her job for personal reasons. She denies that she left her job for personal reasons and says that she left because of bullying and harassment. However, the General

[2] Subsection 58(1)(c) of the DESDA states that one of the grounds of appeal arises when the General Division bases 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.

Division did not make any findings –one way or the other—about why she left her job. The General Division simply did not say anything about why she left her job. More importantly, I find that the General Division did not base its decision on why the Claimant left her job.

[11] The Claimant argues that the General Division made an important error of fact about why she was late when she brought her appeal to the General Division. The Claimant states that she experienced side-effects from various medications, which affected her daily functioning. This caused her to be late with filing an appeal to the General Division.

[12] The Claimant did not state when she received the Commission's reconsideration decision. She acknowledges that she was late when she brought her appeal. She also does not dispute the General Division's findings about when she received the Commission's reconsideration decision.

[13] In her Notice of Appeal to the General Division, the Claimant explained that she was late in bringing her appeal because of "health problems."[3] The General Division noted this.[4]

[14] The General Division did not consider whether the Claimant's health problems excused her delay. It is clear that it did not consider her health problems because it considered them irrelevant. The General Division said that section 52(2) of the DESDA applied. That section states that, "in no case may an appeal be brought more than one year after the reconsideration decision was communicated."

[15] The General Division did not make an important error of fact by overlooking the Claimant's reason for her delay. Even though the Claimant has had limitations with functioning, the DESDA "does not permit any discretion to be applied."[5] I find that because of the inflexibility of section 52(2) of the DESDA, the General Division had no authority to consider how the Claimant's health problems affected her ability to bring an appeal to the General Division on time.

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[3] See Notice of Appeal filed on May 5, 2020, at GD2-4.
[4] See General Division decision, at para. 6.
[5] *Fazal v Canada (Attorney General)*, 2016 FC 487. Although this decision was in the context of an application for leave to appeal to the Appeal Division, the wording for extensions of time to file an application for leave to appeal under section 57(2) of the DESDA is the same as the wording in section 52(2) of the DESDA.

[16] Finally, even if the Claimant brought her appeal to the General Division within the one-year deadline (but was still late), the General Division would still have had to decide whether to grant an extension of time. It would have had to consider whether the Claimant's appeal had a reasonable chance of success.

[17] The Claimant's appeal to the General Division was bound to fail. She did not have enough insurable hours in her qualifying period to qualify for either Employment Insurance sickness or regular benefits. The evidence showed that she had 443 hours of insurable employment. She needed 600 hours of insurable employment for special benefits, or 665 hours for regular benefits.[6]

[18] Clearly, the Claimant did not have an arguable case and her appeal did not have a reasonable chance of success. I do not see any basis where the General Division could have granted an extension of time for the Claimant to bring her appeal to the General Division. Given the fact that the Claimant was late by more than one year, the General Division did not have any choice but to dismiss her appeal.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	N. D., Self-represented

[6] See Claimant's record of employment at GD3-18, which shows that the Claimant had 443 hours of insurable employment. Section 7 of the *Employment Insurance Act* sets out what the Claimant needed to qualify for regular benefits, while subsection 93(1)(b) of the *Employment Insurance Regulations* requires a claimant to have 600 or more hours of insurable employment in their qualifying period.