



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DF v Canada Employment Insurance Commission*, 2021 SST 12

Tribunal File Number: AD-20-864

BETWEEN:

D. F.

Applicant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Janet Lew

Date of Decision: January 25, 2021

DECISION AND REASONS

DECISION

[1] The request for an extension of time to file an application to the Appeal Division is refused because there is no arguable case.

OVERVIEW

[2] The Applicant D. F. is seeking leave to appeal the General Division's decision in Social Security Tribunal file number GE-20-1564.¹ Seeking leave to appeal is another way of saying that applicants have to get permission from the Appeal Division before they can move on to the next stage of the appeal process. They can get this permission if they can show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.²

[3] The General Division found that the Claimant did not show good cause for the delay in applying for employment insurance benefits. Without good cause, the Claimant's application could not be treated as though it had been made on an earlier date.

[4] The Claimant argues that the General Division made several procedural errors in his case. He argues, for instance, that the General Division failed to give him the chance to cross-examine any witnesses or submit any rebuttal evidence. He also argues that the General Division failed to exclude the evidence of the Respondent, the Canada Employment Insurance Commission.

[5] Before I can consider whether to grant leave to appeal, I have to decide whether the Claimant filed his application to 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. However, if the appeal does not have a reasonable chance of success, there would be no basis for me to grant an extension of time, let alone, grant leave to appeal.

¹ The Claimant had two appeals at the General Division, under Tribunal file numbers GE-20-1564 and GE-20-2061. Appeal file number GE-20-2061 deals with the issue of the Claimant's qualifying period.

² *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[6] I find that the Claimant was late when he filed his application to the Appeal Division. I also find that the Claimant does not have an arguable case. Because of this, I am not granting an extension of time to file an application to the Appeal Division.

PRELIMINARY MATTERS

[7] The Claimant has another application to the Appeal Division under Tribunal file number AD-20-865. He is asking the Appeal Division to consolidate both proceedings into one application. He argues that it would be efficient to do so. He suggests that the issues in one application affect his other application, so claims that it would be efficient to consolidate the two matters. However, he does not articulate how a decision in one application affects the decision in his other application.

[8] Both appeals application to the same application for employment insurance benefits. Some of the evidence, such as the records of employment, is the same in both appeals. Significantly, the Claimant's requests for reconsideration in both appeals to the General Division arise out of the same decision that the Commission made on March 18, 2020.³ Overlapping evidence makes it attractive to hear both applications together.

[9] However, the issue in each application is different. The Claimant's application in Tribunal file number AD-20-864 deals with the issue of backdating the Claimant's application for benefits, while the application in Tribunal file number AD-20-865 deals with whether the Claimant is entitled to an extension of his qualifying period. The two applications to the Appeal Division do not touch on any of the underlying issues.

[10] Further, although the Claimant's arguments are largely the same for both applications to the Appeal Division (both centre on procedural errors that the General Division member allegedly made), they are based on a different set of facts. One application relates to the General Division hearings on September 1, 2020, while the other application relates to the General Division hearings on November 9 and 12, 2020.

³ Commission's letter dated March 18, 2020, at GD3-52 in Tribunal file number GE-20-1564 and at GD3-19 in Tribunal file number GE-20-2061.

[11] As well, while some of the facts in both appeals overlap, there are some factual differences. One of the Claimant's arguments is that the General Division failed to exclude the Commission's evidence and submissions. While this occurred in both General Division appeals, the Commission's evidence in each case was not uniform. The Commission had different telephone log notes for each appeal. The Commission's submissions in each General Division appeal was different too.

[12] The other major difference between the two applications to the Appeal Division is that the Claimant was late when he filed one of the applications. That particular application requires an assessment that does not apply nor is relevant to the other application.

[13] These differences warrant having two separate decisions and maintaining two separate Appeal Division files.

ISSUES

[14] The issues are:

1. Did the Claimant file his application to the Appeal Division on time?
2. If not, do the circumstances warrant extending the time to let the Claimant file an application to the Appeal Division?
3. If I grant an extension of time and then consider whether to grant leave to appeal, is there an arguable case that the General Division made any procedural errors?

ANALYSIS

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

[15] No. the Claimant did not file an application to the Appeal Division on time. The Claimant acknowledges that he was late.

[16] If the Claimant did not file his application to the Appeal Division on time, then he needs to get an extension of time. If I do not grant an extension of time, then this ends the Claimant's appeal of the General Divisions' decision.

[17] The Claimant received the General Division's decision on September 8, 2020. He therefore had until October 9, 2020, to file an application to the Appeal Division.⁴ However, the Claimant did not file an application until December 18, 2020. He was 70 days late when he filed an application to the Appeal Division.

2. Do the circumstances warrant extending the time to let the Claimant file an application to the Appeal Division?

[18] I have the authority to give the Claimant extra time to file an application to the Appeal Division.⁵ However, I must consider certain factors,⁶ including whether:

- 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 was excessive;
- the Commission will be prejudiced if I grant an extension; and
- the Claimant had a continuing intention to pursue the application.⁷

[19] But, a claimant does not have to meet all these factors. The Federal Court of Appeal has said that, above all, I have to consider the interests of justice.⁸

[20] The delay involved is not excessive. The Canada Employment Insurance Commission is unlikely to face any prejudice if I were to grant an extension of time.

[21] The Claimant explains that he was late "as a direct result of the Commission being unresponsive to certain aspects of [his] original appeal to the General Division. Therefore, it was not efficient to file an appeal on the September 8th decision because all items in [his] original appeal where [*sic*] not yet ruled on by the General Division."

⁴ Under section 57(1)(a) of the *Department of Employment and Social Development Act*, an applicant has to file an application to the Appeal Division within 30 days after the day on which they received the General Division's decision.

⁵ Section 57(2) of the DESDA.

⁶ *X (Re)*, 2014 FCA 249; *Canada (Attorney General) v Larkman*, 2012 FCA 204.

⁷ *Ibid.* See also *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

⁸ *Larkman, supra.*

[22] The Claimant is arguing that the General Division member in Tribunal file number GE-20-1564 should have addressed both the antedate issue and the issue regarding his request for an extension to his qualifying period. However, while there is some overlapping evidence between the two appeal files, each appeal addresses two distinct issues that are independent of each other.

[23] However, it was unnecessary for the Claimant to await the outcome of his appeal regarding the extension of the qualifying period. He could have appealed the General Division's decision in file number GE-20-1564 without waiting for a decision in his other appeal (GE-20-2061).

[24] Even so, the Claimant believed the decision in his appeal (GE-20-2061) was not only relevant, but also vital to his appeal of the General Division's decision in file number GE-20-1564. For this reason, his explanation for the delay in filing the application to the Appeal Division is reasonable. It also suggests that the Claimant had a continuing intention to pursue an application to the Appeal Division.

[25] Of greater concern however is whether the Claimant has an arguable case. 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. If the Claimant does not have an arguable case (or, in other words, if his appeal does not have a reasonable chance of success), then there is no point in granting an extension of time to file an application to the Appeal Division.

[26] For an arguable case to exist, there has to be the type of error that is listed in section 58(1) of the *Department of Employment and Social Development Act* (DESDA). These errors would be where the General Division:

- (a) Failed to provide a fair process;
- (b) Failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- (c) Made an error of law; or
- (d) Based its decision on an important factual error (perverse, capricious, or without regard for the evidence).

[27] Of these, the Claimant argues that the General Division did not provide him with a fair process. In particular, he argues that the General Division made several procedural errors, as follows, by:

- Failing to notify him that the Commission would not be attending the General Division hearing.
- Failing to provide him with the opportunity to cross-examine the Commission on its evidence.
- Failing to allow him to reply to the Commission's submissions, and finally,
- Failing to exclude the Commission's evidence.

[28] I will review each of these claims to determine whether there is an arguable case.

i. The Claimant claims that the General Division should have notified him that the Commission would not be attending the General Division hearing

[29] There is no arguable case that the General Division should have notified the Claimant that the Commission would not be attending the General Division hearing.

[30] The General Division hearing took place on September 1, 2020. No one appeared for the Commission. The Claimant argues that the Tribunal or the General Division should have notified him that no one would be appearing for the Commission. He claims that the Commission's absence at the hearing affected his ability to present his case fully and fairly, primarily because he could not cross-examine the Commission on its evidence.

[31] Unless a party notifies the Tribunal that it will not be attending the hearing, the General Division cannot anticipate whether a party will attend the hearings. In this case, there is no indication that the Commission ever informed the Tribunal that it would not be sending a representative to the hearing on September 1, 2020. Without knowing the Commission's plans, the Tribunal could not tell the Claimant whether the Commission would be attending the hearing.

[32] Apart from that, there is no obligation on a party to attend hearings. The Tribunal alluded to this in the Notice of Hearing. There is a section titled, "Failure to Attend the Hearing." The section reads:

If a party does not attend the hearing, the Tribunal member may proceed in the absence of the party if the member is satisfied that the party has received the notice of hearing.⁹

[33] It is clear from the Notice of Hearing that parties can choose not to attend a hearing. The General Division member has no authority to compel a party, including the Commission, to attend a hearing.

[34] If a party does not attend a hearing, the General Division member can still go ahead with the hearing, as long as the member is satisfied that the absent party got notice of the hearing.

[35] Even if the Commission had notified the General Division that it would not be sending a representative to the hearing, neither the Tribunal nor the General Division were required to alert the Claimant that the Commission would not be attending. That said, I cannot envision that that would ever happen. As a matter of practice, the Tribunal distributes copies of any correspondence or documents from a party to all other parties.

ii. The Claimant claims that the General Division did not give him the chance to cross-examine the Commission

[36] As no one appeared for the Commission at the hearing, the Claimant argues that the General Division deprived him of the chance to cross-examine the Commission on its evidence.¹⁰

[37] However, the Claimant does not have an arguable case. This is not a situation where the General Division did not let the Claimant cross-examine a witness. There simply were no (Commission) witnesses for the Claimant to cross-examine. The Commission did not produce any witnesses, let alone send a representative to the hearing.

[38] It would have been a different matter altogether if a witness testified for the Commission and the General Division refused to give the Claimant a chance to cross-examine that witness. Under that scenario, I would have found that the Claimant had an arguable case that the General Division made a procedural error and that the Claimant did not get a fair hearing.

⁹ Notice of Hearing dated August 21, 2020, at GD1-3, and Notice of Hearing dated August 25, 2020, at GD1A-3.

¹⁰ The Commission's evidence was set out in the Reconsideration file, at GD3.

[39] This also is not a situation where the Claimant had alerted the General Division or the Commission that he intended to cross-examine a representative or witness on behalf of the Commission. (Typically, this arises when there is opinion evidence.) The Claimant did not give advance notice to the Commission that he required a named representative to attend so that he could cross-examine that representative on their evidence. If that witness had appeared and given evidence, the General Division should have then allowed for cross-examination of that witness.

[40] But, it is too late now for the Claimant to object that he did not get a chance to conduct any cross-examination when he did not identify and ask the other party to produce a witness for cross-examination.

iii. The Claimant claims that the General Division did not give him the chance to rebut the Commission's submissions

[41] The Claimant argues that he did not get a fair chance to present his case because the General Division did not let him reply to the Commission's submissions.

[42] The Claimant does not have an arguable case. The General Division gave the Claimant a fair opportunity to respond to the Commission's submissions, both before and during the hearing.

[43] The Claimant filed his notice of appeal with the General Division on June 5, 2020. The Commission produced its reconsideration file and its written arguments on June 15, 2020.¹¹ The General Division then held a hearing on September 1, 2020.

[44] The Claimant submits that the General Division violated his rights and the "principles of a judicial process" because the General Division did not give him the opportunity to respond to the Commission's submissions.¹²

[45] But, this is not a situation where the General Division ruled against the Claimant by denying him the chance to rebut the Commission's submissions. There is no evidence that the Claimant ever alerted the Tribunal or the General Division that he intended to file a written

¹¹ Representations of the Commission to the Social Security Tribunal – Employment Insurance Section, at GD4.

¹² Application to the Appeal Division – Employment Insurance, AD1-6.

rebuttal to the Commission's submissions. If the Claimant ever intended to file rebuttal, the General Division was unaware of it.

[46] While the General Division did not invite the Claimant's rebuttal to the Commission's arguments, the evidence shows that neither the Tribunal nor the General Division denied the Claimant the opportunity to reply to the Commission's submissions.

[47] It is clear from the Tribunal's letters to the Claimant that it was always open to him to file any additional documents with the Tribunal, including any reply.

[48] In its letter of June 8, 2020, the Tribunal advised the Claimant that the Tribunal did not obtain documents or gather evidence. It highlighted the fact that it was "each party's responsibility to file with the Tribunal any documents they would like the Tribunal member to consider."¹³

[49] After receiving the Commission's reconsideration file, the Tribunal sent another letter to the Claimant. In its letter of June 16, 2020, the Tribunal advised the Claimant how he could send documents to the Tribunal. The Tribunal provided an address, email and fax number.

[50] The Tribunal again described how both parties could send documents to the Tribunal in both of its August 2020 Notices of Hearing,¹⁴

[51] Furthermore, the Claimant was not required or limited to replying to the Commission's position in writing. He could have responded to the Commission's submissions orally, during the General Division videoconference hearing. The General Division member let the Claimant testify, reply to the Commission's evidence and submissions, and make any arguments during the videoconference hearing. Indeed, the Claimant did just that during the hearing.

[52] Not only did the Claimant have a chance to reply, but he also acknowledged that he had fully addressed the Commission's position. The following exchange took place between the Claimant and the General Division member during the hearing:

¹³ Tribunal's letter dated June 8, 2020.

¹⁴ Notice of Hearing dated August 21, 2020, at GD1-3, and Notice of Hearing dated August 25, 2020, at GD1A-3.

Claimant: Most of this is just uh raising my concerns with some of the evidence that was presented by the Commission.

Member: Ok. Did we cover it?

Claimant: I think we did for the most part. ... yeah, we covered this one ... Covered that one. Definitely covered this one. Yeah, I think it's all covered.¹⁵

[53] The evidence shows that the Tribunal and the General Division allowed the Claimant to make both written and oral submissions. Hence, I am not satisfied that there is an arguable case that the General Division did not give the Claimant a chance to reply to the Commission's arguments.

iv. The Claimant argues that the General Division should have excluded the Commission's evidence from the record

[54] The Claimant argues that the General Division should have excluded the Commission's evidence under Tribunal file number GE-20-1564 because the Commission did not have anyone attend the hearing on its behalf.

[55] The Claimant does not have an arguable case on this point. The Claimant's objections to the admissibility of the Commission's evidence come too late. He should have raised his objections early on, at the first available hearing, and certainly by the General Division hearing. That way, the General Division member would have been aware that the admissibility of the Commission's evidence was at issue. It could have then considered the Claimant's objections and decided on the admissibility of these documents.

[56] Apart from this consideration, there are no rules that required the General Division to exclude this evidence on the ground that the Commission did not attend the hearing.

[57] Unlike a court of law, the General Division is an administrative tribunal body. It does not adhere to the strict rules of evidence. It can accept evidence that a court of law might exclude or deem inadmissible.

¹⁵ At approximately 58:25 to 59:27 of the audio recording of the General Division hearing on September 1, 2020.

[58] In matters before the General Division, parties generally file evidence before a hearing even takes place. This is unlike a hearing in court, where generally a party tenders evidence through appropriate witnesses.

[59] Indeed, under the *Social Security Tribunal Regulations*,¹⁶ the Commission is required to file any documents that it has that are relevant. The section requires the Commission to file these documents within seven business days after the day on which it receives a copy of the appeal.

[60] Upon receiving the Commission's documents, the Tribunal marks them, similar to marking exhibits in court. In this case, the Tribunal marked the Commission's documents as "GD3 – Reconsideration file." The Tribunal accepted these documents. They represented the Commission's evidence upon which the Commission (and Claimant) relied. They formed part of the hearing file.

[61] The Tribunal gave the Claimant a copy of the Commission's documents. The Claimant received a copy of the Commission's evidence before the General Division hearing took place.

[62] The Claimant asserts that he "moved to have certain aspects of their evidence dismissed"¹⁷ at the General Division hearing. However, this is not borne out by the audio recording of the General Division hearing under Tribunal file number GE-20-1564.

[63] Even now, the Claimant does not identify the Commission's evidence to which he is objecting. He does not set out the basis of his objections either, other than to say the Commission did not attend the hearing.

[64] I recognize that the Claimant is saying, in part, that the General Division should have excluded the evidence because he did not have a chance to cross-examine the Commission's witnesses. But, as I have noted above, the Commission did not produce any witnesses. As well, the Claimant did not identify any witnesses or ask the Commission to produce any witnesses for cross-examination.

¹⁶ Section 30 of the *Social Security Tribunal Regulations*.

¹⁷ Application to the Appeal Division – Employment Insurance, AD1-6.

[65] I am not satisfied that there is an arguable case that the General Division should have excluded the Commission's evidence. The Claimant did not raise any objections to the Commission's evidence, so the General Division was unaware that this was even an issue.

[66] I am not satisfied that the Claimant has an arguable case. For that reason, I am not granting an extension of time to allow the Claimant to file an application to the Appeal Division.

3. In considering whether to grant leave to appeal, is there an arguable case that the General Division made any procedural errors?

[67] Given that I am not granting an extension of time to the Claimant to file an application to the Appeal Division, it is unnecessary for me to consider whether to grant leave to appeal.

[68] Even if I had granted an extension of time, I would have refused the Claimant's request for leave to appeal because the Claimant does not have an arguable case.

CONCLUSION

[69] The Claimant does not have an arguable case, so I am refusing to grant an extension of time to file an application to the Appeal Division.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	D. F., Self-represented
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