



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *ML v Canada Employment Insurance Commission*, 2021 SST 185

Tribunal File Number: AD-21-66

BETWEEN:

M. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Janet Lew

Date of Decision: May 5, 2021

DECISION AND REASONS

DECISION

[1] I am refusing the request for an extension of time to file an application to the Appeal Division because the Claimant M. L. Le does not have an arguable case.

OVERVIEW

[2] The Claimant is appealing the General Division's decision of July 9, 2020. The General Division found that the Claimant had knowingly provided false or misleading information to the Respondent Canada Employment Insurance Commission. Because of this, the General Division found that the Commission had the right to impose a penalty on the Claimant. The penalty came in the form of a warning. The General Division found that the penalty was appropriate. It was appropriate after considering all the circumstances.

[3] The General Division also concluded that the Claimant did not have enough insurable hours to qualify for Employment Insurance benefits. This meant she had to repay any benefits that she had already received.

[4] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. This has to be based on one of the types of errors listed under section 58(1) of the *Department of Employment and Social Development Act* (DESDA). Before I can even consider whether the appeal has a reasonable chance of success, I have to decide whether the Claimant filed her application on time.

[5] If the Claimant did not file her application on time, then I have to decide whether I should extend the time for filing the application. This involves examining several factors, including whether the Claimant has an arguable case. If I do not extend the time for filing, that ends the Claimant's appeal.

[6] I find that the Claimant was late when she filed her 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 the Claimant for her to file an application to the Appeal Division.

ISSUES

[7] The issues are:

- i. Did the Claimant file her application to the Appeal Division on time?
- ii. If not, should I grant an extension to the Claimant so her application to the Appeal Division is on time?
- iii. If I grant an extension of time and then consider whether to let the Claimant move ahead with her appeal, does the appeal have a reasonable chance of success?

ANALYSIS

i. Did the Claimant file her application to the Appeal Division on time?

[8] No. The Claimant did not file her application to the Appeal Division on time.

[9] If the Claimant did not file her application to the Appeal Division on time, then she 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 Division's decision.

[10] The General Division issued its decision on July 10, 2020. The Social Security Tribunal sent a copy of the decision by regular mail to both the Claimant and her representative. They currently share the same address. The General Division's decision is deemed to have been communicated to the Claimant on July 21, 2020.¹

[11] The Claimant had until August 20, 2020, to file an application to the Appeal Division to be on time.² However, she did not file an application until February 25, 2021. She was about six months late when she filed an application to the Appeal Division.

¹ Under subsection 19(1)(a) of the *Social Security Tribunal Regulations*, a decision is deemed to have been communicated to a party (a) if sent by ordinary mail, 10 days after the day on which it is mailed to the party.

² Under section 57(1)(a) of the DESDA, 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.

ii. Should I grant an extension to the Claimant so her application to the Appeal Division is on time?

[12] I have the power to give the Claimant extra time to file an application to the Appeal Division.³ However, I have to consider certain factors,⁴ 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.⁵

[13] 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.⁶

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

[15] But, the Claimant has not addressed the other factors. The Claimant has not given any reason for the delay in filing an application to the Appeal Division. There is no evidence either that the Claimant had a continuing intention to pursue an appeal to the Appeal Division.

[16] The Tribunal asked the Claimant for information about these factors. The Tribunal wrote to the Claimant's representative on March 9, 2021. The Tribunal gave a copy of its letter to the Claimant. The Tribunal asked the Claimant to explain why she was late and to describe, among other things, how her appeal had a reasonable chance of success.

³ Section 57(2) of the DESDA.

⁴ *X (Re)*, 2014 FCA 249; *Canada (Attorney General) v Larkman*, 2012 FCA 204.

⁵ *Ibid.* See also *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

⁶ *Larkman*, *supra*.

[17] The Tribunal tried contacting the Claimant's representative by phone several times to get a response. The Tribunal also phoned the Claimant directly. The Tribunal left a message with the Claimant. It asked her to have her representative call the Tribunal.

[18] The Claimant's representative contacted the Tribunal on April 1, 2021. He asked for a hearing later that month or in May 2021. Later, he contacted the Tribunal again. He asked for an extension of time to make submissions. He confirmed his request in writing. He asked for an extension of time to make submissions to the end of August 2021.⁷

[19] The Claimant did not give any compelling reasons why she needed a 5-month extension to file submissions. The Appeal Division granted a shorter extension, to April 26, 2021. That date has now passed.

[20] The Claimant has not answered the Tribunal's request for information about her appeal and the late application. I do not know why the Claimant was late with her Application. I do not know whether she always intended to appeal the General Division's decision.

[21] Of greater concern is whether the Claimant has an arguable case. In deciding whether it is in the interests of justice to give an extension of time to file an application to the Appeal Division, 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 her appeal does not have a reasonable chance of success⁸), then there is little point in granting an extension of time.

[22] For an arguable case to exist, it has to be based on one of the errors listed under section 58(1) of the DESDA. Types of errors under section 58(1) of the DESDA include where the General Division:

- (a) Failed to make sure the process was fair;

⁷ Claimant's letter dated April 5, 2021, at AD3.

⁸ *Fancy v Canada (Attorney General)*, 2010 FCA 63 states that a reasonable chance of success is the same thing as an arguable case.

- (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 material before it).

[23] The Claimant does not say that the General Division made any errors. In her application to the Appeal Division, she simply wrote:

I wish to take this to a higher court because I worked and have proof of it, and would like to fight for my rights.

I have a friend [her representative] helping me write this letter.

[24] It seems that the Claimant is looking for a reassessment of her claim. But, an appeal to the Appeal Division is not a rehearing. This falls short of satisfying me that there is an arguable case or that the appeal has a reasonable chance of success.

[25] Finally, I have reviewed the underlying record. I have done this to make sure that the General Division did not misconstrue or mischaracterize any important evidence.

[26] At the General Division, the Claimant argued that records proved that she was an employee of a numbered company. She relied on records of employment, a letter from her employer, a T4 slip and pay stubs, as well as tax records to support her claims.⁹

[27] The General Division addressed the Claimant's arguments and noted each of these documents. For instance, the General Division noted the employer's letter that read, "Please accept this letter as confirmation that [the Claimant] has been employed [by the employer] since 2013."¹⁰

⁹ See Notice of Appeal - Employment Insurance – General Division, at GD2-3, records of employment, at GD7 and GD8, and records at GD10. See also Claimant's letter dated November 6, 2019, at GD3-94.

¹⁰ General Division decision, at para. 31.

[28] However, the General Division explained why it rejected these documents, including the record of employment. The General Division did not dispute the company's existence. But, it concluded that the Claimant never performed any duties or worked for the company. It determined that the Claimant and the employer colluded. They colluded for the purposes of procuring Employment Insurance benefits to which the Claimant was not entitled.¹¹

[29] The General Division reviewed the employer's business records. It found irregularities with these records. The General Division was unable to find any documents such as timesheets or attendance records that bore the Claimant's name. The General Division noted that the employer was able to produce these types of documents for other employees.

[30] The General Division acknowledged that the employer's records might not be "completely accurate." However, it was unable to locate any reference at all to the Claimant's name in any of the employer's records. For the General Division, this showed that the Claimant had not worked for the employer.

[31] On top of that, the General Division found the Claimant's testimony vague and lacking in detail. The General Division found that this Claimant was unable to provide much information about her employment. Even if there was a language barrier (since the Claimant was a relative newcomer to Canada), the General Division found it implausible that the Claimant was unable to answer even basic questions about her employment.

[32] The General Division also rejected the employer's letter because it found the employer was not credible. The employer had an interest in the outcome of the Claimant's appeal. The General Division found the employer's letter to be self-serving.

[33] The General Division was entitled to draw these conclusions, in light of the evidence before it, or the lack of evidence.

[34] I am not satisfied that the Claimant has an arguable case or that the appeal has a reasonable chance of success.

¹¹ General Division decision, at para. 28.

iii. Does the appeal have a reasonable chance of success?

[35] I am not granting an extension of time to the Claimant to file an application to the Appeal Division. So, it is unnecessary for me to consider whether the Claimant can move on with her appeal.

[36] But, even if I had granted an extension of time, I would have refused to let the Claimant move ahead with her appeal because the Claimant does not have an arguable case.

CONCLUSION

[37] The Claimant does not have an arguable case, so I am refusing to grant an extension of time to the Claimant. This ends the Claimant's appeal.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	Dung Van Truong, for the Applicant
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