



Citation : *DB v Canada Employment Insurance Commission*, 2021 SST 391

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: D. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 9, 2021 GE-21-417

Tribunal member: Melanie Petrunia

Decision date: August 5, 2021

File number: AD-21-229

Decision

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

Overview

[2] D. B. (Claimant) applied for sickness benefits in March 2020 and received the Canada Emergency Response Benefit (CERB). He returned to work for his previous employer from April 8th until May 26, 2020. On October 3, 2020, CERB ended and all claimants were transferred to regular benefits.

[3] On October 23, 2020, the Claimant was told that he was disqualified from receiving regular benefits because he lost his job as a result of his own misconduct. The Claimant requested the claim be converted to sickness benefits. This was approved and the Claimant received 15 weeks of sickness benefits.

[4] On January 16, 2021, the Claimant applied for regular benefits. The Commission told the Claimant that he was disqualified from receiving regular benefits because of the misconduct at his last employment. The Claimant asked the Commission to reconsider and the Commission maintained its decision.

[5] The Claimant appealed to the General Division of the Social Security Tribunal and his appeal was dismissed. The General Division found that the Claimant had lost his job because he was repeatedly absent from work without notifying the employer. The General Division found that this was misconduct under the law.

[6] The Claimant now seeks leave to appeal the General Division decision. He argues that the General Division didn't follow procedural fairness. He claims that he did not see certain documents that were submitted by the employer until after the hearing.

[7] Before I can consider whether to grant leave to appeal, I have to decide whether the Claimant filed his application for leave to appeal with the Appeal Division on time. If I find he did not file his application on time, then I have to decide whether to extend the deadline.

[8] I find that the Claimant filed his application for leave to appeal late. I am refusing an extension of time and leave to appeal because the appeal does not have a reasonable chance of success.

Preliminary matters

[9] The Claimant submitted a number of documents to the Tribunal that are considered new evidence including bank statements and information about the weather on March 5, 2020.¹ These documents were not before the General Division. The Appeal Division is generally not permitted to consider new evidence on appeal. I will not be taking this evidence into consideration.

Issues

[10] The issues are:

- a) Was the application to the Appeal Division late?
- b) If so, should I extend the time for filing the application?

Analysis

The application was late

[11] I find that the application for leave to appeal was filed late. An application for leave to appeal and Employment Insurance decision to the Tribunal's Appeal Division must be made within 30 days after the day on which the General Division decision was communicated to the Claimant.²

[12] The General Division decision is dated April 9, 2021. The Social Security Tribunal sent a copy of the decision by email to the Claimant on April 12, 2021. The

¹ AD01C contains bank records not before the General Division. AD01G is a news story about the weather on March 5, 2020, which was also not before General Division.

² *Department of Employment and Social Development Act (DESD Act)*, s. 57(1)(a).

Claimant had until May 13, 2021 to file an application to the Appeal Division to be on time.³ However, he did not file an application until July 5, 2021.

I am not extending the time for filing the application

[13] The deadline for filing the appeal should not be extended because the Claimant does not have an arguable case on appeal. It is not in the interests of justice to allow the extension where there is no arguable case.

[14] I have the power to give the Claimant extra time to file an application to the Appeal Division. When deciding whether to grant an extension of time, I have to consider the following factors:

- a) Was there a continuing intention to pursue the application?
- b) Does the application disclose an arguable case?
- c) Is there a reasonable explanation for the delay?
- d) Is there prejudice to the other party?⁴

[15] The importance of each factor may be different depending on the case. Above all, I have to consider if the interests of justice are served by granting the extension.⁵

[16] The delay involved is not excessive. The Claimant was approximately 7 weeks late in filing his application for leave to appeal. The Commission is unlikely to face any prejudice if I grant an extension of time.

[17] The Claimant was asked for more information about the reasons for the delay. The Claimant sent a screenshot of emails he thought he had sent with an application for leave to appeal on April 13, 2021. He said that it was sent to the wrong address. He thought he had appealed in time and contacted the Tribunal twice. When he realized

³ Under subsection 19(1)(c) of the *Social Security Tribunal Regulations*, a decision sent by email is deemed to have been communicated to a party on the next business day after it is transmitted.

⁴ The Federal Court set out this test in *Canada (Minister of Human Resources Development) v Gattellaro*, [2005 FC 833](#).

⁵ The Federal Court of Appeal outlined this test in *Canada (Attorney General) v Larkman*, [2012 FCA 204](#).

that the application had not gone through, he sent it in. He stated that he was confused in the beginning on the next steps.

[18] I find that the Claimant had a continuing intention to pursue the application because the Claimant showed that he thought he had emailed an application for leave to appeal on April 13, 2021. I also find that there was a reasonable explanation for the delay because he initially thought he had filed the application and was confused about next steps when he realized that the application did not go through.

[19] In deciding whether it is in the interests of justice to give an extension of time to file an application to the Appeal Division, I have placed more weight on whether there is an arguable case. If the Claimant does not have an arguable case, then there is little point in granting an extension of time.

[20] For an arguable case to exist, it has to be based on one of the errors listed under section 58(1) of the DESD Act. The types of errors include where the General Division:

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

– **There is no arguable case that the General Division did not follow procedural fairness**

[21] In his application for leave to appeal, the Claimant states that the General Division did not follow procedural fairness. He claims that he did not see documents that his employer had submitted until after the hearing. He says that he saw after the hearing where his employer said that he “no-showed” and claims that this isn’t true.⁶ He

⁶ AD01 – Request for Leave to Appeal at page 4.

states that his last day was May 15th and that he did not “no-show” on the days claimed by the employer.⁷

[22] I have listened to the hearing before the General Division. During the hearing, the General Division member asked the Claimant if he had all of the documents with him and he confirmed that he did. She pointed to specific page numbers in the Reconsideration File and asked the Claimant for his position on the employer’s statements. She also directed the Claimant to the Employee Working Hour List for May 2021.⁸ She asked the Claimant about the references to certain dates when he was recorded as “no-show/no-call”. The Claimant denied that he did not show up for work on those dates and said that the employer was lying.⁹

[23] The General Division member discusses this testimony in the decision.¹⁰ It is clear from the decision and the recording of the hearing that the Claimant was asked about the employer’s documents at the hearing. There is no arguable case that he did not see these documents until after the hearing.

– **There is no arguable case that the General Division made an error of fact**

[24] The Claimant did not identify any other errors in his application for leave to appeal. In later submissions to the Tribunal he argues that it is inconsistent for the General Division to find that he was dismissed for being a “no-show” on May 27th, 28th and 29th when the Record of Employment stated his last day of work was May 26th.¹¹ I have considered whether there is an arguable case that this is an error of fact.

[25] The Record of Employment that the Claimant refers to, states that the final pay period end date was May 30th and that May 26th was the last day for which the Claimant was paid. I find that this is not inconsistent with finding that the Claimant did not show up for work on the 27th, 28th and 29th. The General Division decision cited the employer’s policy on Reporting for Work/Absenteeism. This policy states that an

⁷ AD01C

⁸ Recording of General Division hearing at 30:40

⁹ Recording of General Division hearing at 31:30

¹⁰ General Division decision paragraph 16.

¹¹ AD01I and AD01J.

employee who is absent from work without explanation may be considered to have quit and a termination may be issued.¹²

[26] The General Division asked the Claimant about this policy and he claimed he was not aware of it. He also denied that the initials “DB” on the employee orientation form showing that he was given a copy of the policy were his.¹³ The Claimant also confirmed receiving a text message from his supervisor stating that he had no choice but to let him go, that his attendance was terrible and that he didn’t call when he did not show up.¹⁴ The Claimant’s witness also confirmed seeing this text message.¹⁵

[27] I find that the ROE showing the pay period ending on May 30th and that May 26th was the last day for which he was paid, is consistent with the employer’s policy. There is no arguable case that the General Division made an error of fact in this respect.

[28] The Claimant made a number of submissions to the Tribunal arguing that he had asked to be moved to a new job site because of an incident on May 11th. He claims that he felt unsafe at the job site and that he was waiting to be told if he would be moved.¹⁶ He also claims that his supervisor failed to show up 2-3 times.¹⁷

[29] I have reviewed the written record before the General Division and listened to the hearing. These facts and arguments were not raised at the General Division. As stated above, I cannot consider new evidence.

[30] In his application for leave to appeal and in the additional submissions he has filed, it seems that Claimant is wanting to present his case again. Unfortunately, an appeal to the Appeal Division is not a new hearing where a party can present new evidence and hope for a different outcome.

¹² General Division decision at para 14.

¹³ Recording of General Division hearing at 32:00 to 33:00.

¹⁴ General Division decision at para 17.

¹⁵ General Division decision at para 22.

¹⁶ AD01B and AD01C.

¹⁷ AD01.

[31] I have also considered grounds not raised by the Claimant. After reviewing the record and listening to the appeal before the General Division, I have not identified any errors of law or jurisdiction. I find that the Claimant does not have an arguable case on appeal.

Conclusion

[32] The Claimant does not have an arguable case so I am refusing to grant an extension of time. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division