



Citation: *KS v Canada Employment Insurance Commission*, 2021 SST 466

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: K. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 31, 2021
(GE-21-694)

Tribunal member: Pierre Lafontaine

Decision date: September 8, 2021

File number: AD-21-274

Decision

[1] An extension of time to file an application for leave (permission) to appeal is refused.

Overview

[2] The Applicant (Claimant) worked as a supply educational resource worker for a school board. The Respondent (Commission) determined that the Claimant did not report all her wages for the weeks of September 3, 2017, November 5, 2017, March 11, 2018 and March 18, 2018. The Commission decided that the unreported wages are “earnings” under the law because they arose from the Claimant’s employment and that they had to allocate them to the week the wages were earned. This allocation resulted in an overpayment of \$1,153.00.

[3] The Claimant requested a reconsideration of this decision, and the Commission maintained its initial decision. The Claimant appealed to the General Division of the Tribunal.

[4] The General Division found that the Claimant worked and was paid wages in the weeks of September 3, and November 5, 2017, as indicated by the employer. It found that the Claimant was paid the wages the employer declared for the weeks of March 11, 2018 and March 18, 2018. The General Division concluded that the Commission correctly allocated the Claimant’s earnings and correctly calculated the overpayment.

[5] The Claimant now seeks leave to appeal of the General Division’s decision to the Appeal Division. She puts forward that she reports her earnings to the best of her knowledge because some money is put away to be paid later. She disputes the Commission’s overpayment calculations because she never receives wages for two weeks during March break.

[6] I sent a letter to the Claimant requesting that she explain in detail her grounds of appeal. I informed the Claimant that it was insufficient to repeat what she had said before the General Division. The Claimant did not reply within the allowed time.

[7] I must decide whether the application is late and if so, whether I will allow the late application. If I allow the late application, I must decide whether the appeal has a reasonable chance of success.

[8] I refuse to grant the Claimant an extension of time to file an application for permission to appeal.

ISSUES

[9] Issue 1: Was the application for leave to appeal filed on time? If not, is it appropriate to grant an extension of time to file the application?

[10] Issue 2: If so, does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

ANALYSIS

Issue 1: Was the application for leave to appeal filed on time? If not, is it appropriate to grant an extension of time to file the application?

[11] The Claimant filed her application for leave to appeal on August 15, 2021. She received communication of the General Division decision on June 1, 2021. The application for leave was not filed on time.¹

¹ See Section 57(1) of the *Department of Employment and Social Development Act* indicates that an application for leave to appeal must be made to the Appeal Division 30 days after the day on which a decision is communicated to the claimant.

[12] In deciding whether to grant an extension of time to file an application for leave to appeal to the Appeal Division, the over-riding consideration is whether the interest of justice favors granting the extension.²

[13] Relevant factors to consider are whether:

- (a) there is an arguable case on appeal;
- (b) special circumstances justify the delay in filing the notice of appeal;
- (c) the delay is excessive; and
- (d) the Commission will be prejudiced if the extension is granted.

[14] Although the Commission will not be prejudiced by the delay to file the application for leave to appeal, I find that the delay of almost three months before filing the leave to appeal application to be excessive. The Claimant received the notice of hearing and participated at the hearing held before the General Division on May 17, 2021. She received the General Division decision by email on June 1, 2021. She explains that she did not see the decision sent to her email box because she receives many emails in her inbox. She proceeded to call the Commission on August 8, 2021, and she then learned about the General Division decision.

[15] I note that the Claimant gave the General Division permission to contact her by email. The General Division sent the decision to the email indicated in her application to appeal to the General Division. I find that the Claimant has not raised any special circumstances that prevented her from filing a leave to appeal application during the allowed time.³

² *X (Re)*, 2014 FCA 249, *Grewal v Minister of Employment and Immigration*, [1985] 2 F.C. 263 (F.C.A.).

³ See Section 57(1) of the *Department of Employment and Social Development Act* indicates that an application for leave to appeal must be made to the Appeal Division 30 days after the day on which a decision is communicated to the claimant.

[16] Furthermore, I am not convinced that the Claimant has an arguable case or that her appeal has a reasonable chance of success.

[17] In support of her application for permission to appeal, the Claimant puts forward that she reports her earnings to the best of her knowledge because some money is put away to be paid later. She disputes the Commission's overpayment calculations because she only receives wages for one week during the two weeks March break.⁴

[18] The employer declared that the Claimant received wages in the amount of \$1,348.12 for the week of March 11, 2018, and \$1,348.12 for the week of March 18, 2018.⁵

[19] The General Division determined that the Claimant had the week of March 11, 2018, or March 18, 2018, off work for March break. However, it also determined that under her employment contract, she received wages for both weeks.

[20] The General Division determined that the Claimant received EI benefits in the gross amounts of \$539.00 for both the weeks of March 11, 2018, and March 18, 2018.

[21] After taking into consideration the Claimant's declared earnings, the General Division concluded that the Commission correctly calculated the overpayment of \$1,153.00.⁶

[22] The burden of proof for disputing the employer's pay information rests with the claimant, and mere allegations intended to show doubt are insufficient. They must provide countering evidence before the General Division, which the Claimant has not done.

⁴ See AD1-2.

⁵ See GD3-18, GD3-19.

⁶ See GD6-2.

[23] In light of the evidence before it, the General Division simply could not come at a different conclusion from the one at which it did arrive.

[24] The Claimant, in her leave to appeal application, would essentially like to represent her case to the Appeal Division. Unfortunately, for the Claimant, an appeal to the Appeal Division is not a new hearing, where a party can represent its evidence and hope for a new favorable outcome.

[25] After considering all the above factors, I am not convinced that the interest of justice favors granting the extension.

CONCLUSION

[26] An extension of time to file an application for leave (permission) to appeal is refused.

Pierre Lafontaine
Member, Appeal Division