Citation: *SJ v Canada Employment Insurance Commission*, 2022 SST 883

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	S. J.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 10, 2021 (GE-21-2001)

Tribunal member:	Janet Lew
Decision date:	September 8, 2022
File number:	AD-22-592

Decision

[1] An extension of time to apply for leave (permission) to appeal is granted.

[2] Permission to appeal is refused. The appeal will not be going ahead.

Overview

[3] The Applicant, S. J. (Claimant), is appealing the General Division decision.

[4] The General Division found that the Claimant was not available for work. So, she was not entitled to get Employment Insurance (EI) benefits. But, the Respondent, the Canada Employment Insurance Commission (Commission), already paid her. Since the Commission paid her benefits that she was not supposed to get, she has to repay these benefits.

[5] The Claimant says the General Division was biased. She also says the General Division made important errors of fact. She says the General Division ignored important evidence.

[6] The Claimant says the government should consider her personal and financial situation and provide assistance. She argues that, if she had not been entitled to receive EI benefits, the Commission should have switched her claim to the Canada Recovery Caregiver Benefit (CRCB) program while she could still apply for it.

[7] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2]

[8] There is also the issue about whether the Claimant filed her application to the Appeal Division on time. If the Claimant was late when she filed her application, then she has to get an extension of time. She has to get an extension of time before I can

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[1] Under section 58(2) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."
[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

even consider her application for leave to appeal. If I do not give her an extension of time, her appeal ends.

Issues

[9] The issues are:

i. Was the Claimant late when she filed her application to the Appeal Division?

ii. If the Claimant was late, should I give her an extension of time?

iii. If I grant an extension of time, does the Claimant have an arguable case that the General Division member was biased or overlooked important evidence?

Analysis

The Claimant's application was late

[10] The Claimant does not remember when she received the General Division decision. She says that she "missed the email of this decision".[3] From this, I understand the Claimant got the Tribunal's email with the decision but, for some reason, missed seeing it.

[11] If the Claimant is unable to pinpoint or guess when she got the General Division decision, likely it was sometime before she filed her application to the Appeal Division.

[12] In my review of the records, I see that the Social Security Tribunal (Tribunal) emailed a copy of the decision to the Claimant on December 13, 2021. She is deemed to have received the decision the next day,[4] on December 14, 2021.

[13] The Claimant denies that she ever received the General Division decision until August 19, 2022, or so, after she asked the Tribunal and got a copy. In fact, the Claimant alleges that she kept calling the Tribunal after the hearing in December 2021,

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[3] Application to the Appeal Division--Employment Insurance, at AD1-2.
[4] Under subsection 19(1)(c) of the *Social Security Tribunal Regulations*, if a decision has been sent by email, it is deemed to have been communicated the next business day after the day on which it was transmitted.

asking whether a decision was ready. Each time, someone told her that the member was still working on the decision. She says that she stopped calling.

[14] I find it unlikely that the Claimant kept calling the Tribunal. For one thing, there is no record of any phone calls from the Claimant after the hearing, until August 2022. And two, the General Division issued a decision about a week after the hearing. It is unlikely that anyone at the Tribunal kept telling the Claimant that there was no decision after it had already released the decision.

[15] It is curious that the Claimant would have kept calling the Tribunal at first, as she claims, but then, not call again after many months had gone by.

[16] The Claimant does not say that she checked her emails, including spam folders. So, it is unclear how she can deny that she did not get the General Division decision in mid-December 14, 2021.

[17] Once the Claimant received the Tribunal's decision in December 2021, the Claimant may have just simply overlooked the Tribunal's email or chose not to review and respond to it, for whatever reason, or saw it and meant to do something, but just forgot about it.

[18] In any event, the Tribunal's telephone log notes show that the Claimant called the Tribunal on August 18, 2022. The Claimant says that she just found out from the Commission that the General Division had made a decision. So, she was concerned about how she would pay the overpayment.

[19] The Claimant told the Tribunal that she disagreed with the General Division decision, so the Tribunal sent her an application form. She immediately filed an application to the Appeal Division.

[20] The Claimant seems to acknowledge that her application to the Appeal Division is late. After all, she completed the section on the form that asks an applicant to explain why their application is late.

[21] As the Claimant likely received the General Division decision on December 14, 2021, she would have had to file an application to the Appeal Division by no later than January 13, 2022.[5] She filed an application on August 23, 2022. This was more than 30 days after she got the General Division decision—it was 222 days over the 30 days.

[22] Assuming that the Claimant did not file her application on time, she has to get an extension of time. If the Appeal Division does not grant an extension of time, this would mean that the Appeal Division would not be considering the Claimant's application for leave to appeal. This would also end the Claimant's appeal of the General Division decision.

I am extending the time for filing the application

[23] The Appeal Division may grant an extension to file if an application is late by not more than one year.[6]

[24] When deciding whether to grant an extension of time, I have to consider certain factors.[7] These factors include 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[8]

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[5] Under subsection 57(1)(a) of the DESD Act, an application for leave to appeal must be made to the Appeal Division 30 days after the day on which the decision made by the Employment Insurance Section is communicated to the appellant.
[6] See section 57(2) of the DESD Act.
[7] See *X(Re)*, 2014 FCA 249; *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[8] *X (Re)* and *Larkman*. See also *Canada (Minister of Human Resources Development v Gattellaro*, 2005 FC 883.

[25] The importance of each factor could vary, depending on the facts of the case. A claimant does not have to meet all of these factors. The most important consideration is whether the interests of justice are served by granting an extension.[9] If a claimant does not have an arguable case, generally it is against the interests of justice to grant an extension.

[26] The Claimant explains that she was late because she missed seeing the General Division decision. She claims that she repeatedly called the Tribunal, asking about when she could expect to receive the decision. Although there is no evidence to support this claim, if true, it would show that she had a continuing intention to pursue an appeal.

[27] The delay is long, but the Commission is unlikely to face any prejudice if I grant an extension of time.

[28] These factors narrowly favour granting an extension. The Claimant seems to acknowledge that her application was late. The evidence is unclear as to when the General Division was communicated to the Claimant. But, I will give the benefit of the doubt to the Claimant and grant an extension of time. I will consider whether the Claimant has an arguable case in the context of her application for leave to the Appeal Division.

I am not giving the Claimant permission to appeal

[29] As I noted above, the Appeal Division must grant permission to appeal unless the appeal "has no reasonable chance of success." A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error that the General Division made.

[30] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

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[9] The Federal Court of Appeal outlined this test in *Larkman*.

[31] The Claimant says that she has an arguable case. The Claimant argues the General Division member was biased and made important factual errors. She claims the General Division overlooked some of the evidence. She also says that she is collecting more information for her claim.

– **Bias**

[32] The Claimant argues that the General Division member was biased. However, she does not say why she believes the member was biased.

[33] The Supreme Court of Canada set out the test for a reasonable apprehension of bias. It referred to Grandpré J.'s dissenting opinion in *Committee for Justice and Liberty et al. v National Energy Board et al.*:

> [T]hat test is "what would an informed person, viewing the matter realistically and practically— and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[10]

[34] Merely alleging bias does not meet this test.

[35] I have listened to the audio recording of the General Division hearing. The member made opening remarks. The member explained what the Claimant could expect at the hearing. She outlined the format the hearing would take. The member outlined the case that the Claimant had to prove. She reviewed the documents and facts. She identified the issues and the legal test that the Claimant had to meet.

[36] The member also explained that it was the Claimant's responsibility to get whatever evidence she needed to prove her case. When the Claimant's daughter indicated that there was more information that the employer had, the member gave the Claimant a chance to get that information and to provide that to the Tribunal.

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[10] *Committee for Justice and Liberty et al. v National Energy Board et al.*, 1976 CanLII 2 (SCC).

[37] Throughout the hearing, the member was respectful towards both the Claimant, the Claimant's daughter, and the interpreter. She treated the Claimant in a fair and even-handed manner. The member gave the Claimant a full and fair opportunity to present her case.

[38] In her decision, the General Division member reviewed the evidence before her. This included the evidence from the file and the evidence given at the hearing. The General Division member considered the Claimant's evidence and arguments. The member weighed the evidence and applied the law to those facts that she considered relevant.

[39] The General Division member explained her reasons. She set out the issues and the facts that she had to assess. She identified the facts upon which she relied. The member's analysis was detailed and considered. She explained why she determined that the Claimant was unavailable for work.

[40] The General Division member found that the evidence did not show that the Claimant met the three "*Faucher"* factors.[11] The member found that the evidence did not show that the Claimant wanted to go back to work, that she made efforts to find a suitable job, and that she did not unduly limit her chances of going back to work.

[41] The member considered the relevant facts. In other words, there was nothing arbitrary about the General Division examining the Claimant's circumstances surrounding her efforts to look for work.

[42] I do not see any indication—whether during the hearing or in the decision itself—that suggests that the member was, in any way, biased against the Claimant, or that she treated the Claimant unfairly. The member gave the Claimant a full and fair opportunity to present her case and then issued a decision that was measured and

[11] In *Faucher v Canada Employment and Immigration* Commission, 1997 CanLII 4856 (FCA), the Federal Court of Appeal listed three factors that have to be considered when assessing whether a claimant is available for work. These are called the "*Faucher*" factors.

justified on the facts and the law. I am not satisfied that there is an arguable case that the General Division member was biased.

– **Factual errors**

[43] The Claimant argues that the General Division failed to consider the circumstances she faced.

[44] The Claimant explains that she was the sole caregiver for her daughter, who has a complex health condition and requires 24/7 care. Her daughter was at extremely high risk of contracting COVID-19. So, she limited all contacts for her daughter. Childcare was not a good option either.

[45] The Claimant argues the General Division ignored the medical information on file, as it explained why she had to care for her daughter. She had to stay home to care for her vulnerable daughter.

[46] The Claimant also explains that her employer re-opened with smaller staff. But, she asked for more time off work. She told her employer that she was eager to return to work, once the risks from COVID-19 were lower. Indeed, the Claimant's letter confirms that she "figured [she] would be able to return once the majority of BC had been vaccinated."[12] She says the General Division should have considered this evidence too.

[47] I find that the General Division decision accurately reflects the relevant evidence.

[48] The General Division did not have to set out all the details. It is presumed that the General Division considered all of the evidence in front of it, even if it did not mention it. However, the General Division had to address any evidence if it was of such significance that it could have affected the outcome.

[49] The Claimant argues that the medical records were of such importance that they could have changed the outcome. So, she says the General Division should have considered the details of her daughter's medical condition.

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[12] Claimant's letter dated August 17, 2021, "To whom it may concern," at GD3-32.

[50] But, I find that the specific medical information was irrelevant to the issue of the Claimant's availability. The details of her daughter's medical condition would not have helped the Claimant prove that she was available for work. It did not show the Claimant's willingness to return to work or her job search efforts. If anything, it showed that she placed conditions on returning to work.

[51] Even so, the General Division did in fact note the evidence about the Claimant's daughter's medical issues. For instance, at paragraph 32, the General Division noted the evidence that the Claimant's daughter needs daily care with feeding, moving, and bathing. The General Division referred to letters from medical caregivers that say her daughter is at high risk during the pandemic.

[52] As for the Claimant's employer, the General Division noted that the Claimant asked for more time off. It was irrelevant why she asked for more time off, as it did not speak to any of the *Faucher* factors.

[53] As an aside, I note that the Claimant suggested that she had been unable to return to work because of her own health conditions. I am unaware of any evidence on file that shows that the Claimant had her own health issues that prevented her from working. But, if there is sufficient evidence of this, possibly she can ask whether the Commission would be prepared to convert her claim from regular to sickness benefits.

[54] Otherwise, I do not see any indication that the General Division failed to consider the Claimant's evidence regarding her daughter's health or her work situation. I am not satisfied that there is an arguable case that the General Division overlooked this evidence.

– **New evidence**

[55] The Claimant says she is getting more evidence. However, the fact that there may be more evidence is not a basis for an appeal under the *Department of Employment and Social Development Act*. I am not satisfied that this represents an arguable case.

– **The Canada Recovery Caregiver Benefit program**

[56] The Claimant questions why the Commission did not move her claim to the CRCB program, if she was not eligible for Employment Insurance benefits.

[57] The Claimant was aware of the program. However, she thought switching programs was unnecessary, as she was getting Employment Insurance benefits.

[58] The Commission did not have any duty to steer the Claimant towards the CRCB program, though clearly the Claimant would have welcomed the help. (The Commission did not administer the program, so could not have assessed the Claimant's eligibility. The Canada Revenue Agency administered the program.)

– **The Overpayment**

[59] The Claimant received benefits to which she was not entitled. This created a sizeable overpayment. She says that she and her family are struggling.

[60] The Claimant can contact Canada Revenue Agency's Debt Management Call Centre at 1-866-864-5823 about a repayment schedule for the overpayment. Or, possibly the Claimant can write to the Commission and ask it to consider writing off the debt because of undue hardship.

Conclusion

[61] An extension of time is granted.

[62] As the appeal does not have a reasonable chance of success, permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division