Citation: *MW v Canada Employment Insurance Commission*, 2022 SST 1080

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	M. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 7, 2021 (GE-21-2076)

Tribunal member:	Melanie Petrunia
Decision date:	October 25, 2022
File number:	AD-22-658

Decision

[1] An extension of time to apply for leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, M. W. (Claimant), lost her employment on November 15, 2019 and applied for employment insurance (EI) regular benefits. A benefit period was established effective November 17, 2019.

[3] The employer initially paid the Claimant $18,849 upon separation. After further negotiations, the employer paid the Claimant an additional $99,116.51 as severance pay. An amended record of employment (ROE) was issued by the employer in January 2020 listing the initial amounts paid and the additional severance.

[4] The Respondent, the Canada Employment Insurance Commission (Commission) did not amend the allocation of earnings to add the additional severance pay until August 12, 2021, nineteen months after the ROE was amended. The allocation resulted in an overpayment of EI benefits of $20,232.

[5] The Claimant requested a reconsideration but the Commission maintained its decision. The Claimant appealed to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. It found that the money received by the Claimant was earnings to be allocated to her EI claims. It found that the Commission was within the required time limit to review and amend the claims and, therefore, the Claimant was liable for the overpayment of benefits.

[6] The Claimant now asks for leave to appeal this decision to the Appeal Division. She argues that the General Division made an important error of fact. The Claimant's application for leave to appeal is late. I must decide whether to grant the Claimant an extension of time.

[7] The Claimant's argument about the General Division's error does not have a reasonable chance of success. Without a reasonable chance of success on appeal, it is not in the interests of justice to allow the extension of time. The appeal will not go ahead

Issues

[8] The issues are:

a) Was the Claimant's application to the Appeal Division late?

b) If so, should I extend the time for filing the application?

Analysis

The application was late

[9] The General Division decision is dated December 7, 2021. It was sent to the Claimant on December 8, 2021 by email. The Claimant indicated in her application for leave to appeal that she received the decision in December 2021.[1]

[10] The application for leave to appeal was received on September 13, 2022. This is more than 30 days after the Claimant received the General Division decision. This means that the application was late.

I am not extending the time for filing the application

[11] The Appeal Division may grant an extension to file if an application is late by not more than one year.[2]

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

a) The claimant had a continuing intention to pursue the application;

b) There is a reasonable explanation for the delay;

---

[1] AD1-1
[2] See section 57(2) of the DESD Act.

c) There is prejudice to the other party if I grant the extension; and

d) Is there an arguable case on appeal.[3]

[13] 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.[4]

[14] I do not find that there is any prejudice to the Commission if I grant the application for an extension of time.

[15] In this case, the delay was nine months. The Claimant explained that she initially contacted Service Canada to find out if she could appeal the General Division decision and was told she could not. She says that she asked about this many times over the months when speaking to agents from the Canada Revenue Agency or Service Canada. She says that she was finally told by an agent in late August 2022 that she could appeal.

[16] The file shows that the Claimant spoke to a representative with the Tribunal on December 12, 2021 saying that she wanted to appeal the General Division decision. She requested an appeal form. The Tribunal sent her an email with the form to apply for leave to appeal along with a web link to organizations in BC that could help her.[5]

[17] I find that the reasons provided by the Claimant do not show a continuing intention to appeal or a reasonable explanation for the delay. The Claimant was provided the required form to apply for leave to appeal within the 30-day time limit. These factors do not support granting an extension of time.

[18] However, an important factor is whether the Claimant has an arguable case. An arguable case is a case that has a reasonable chance of success on appeal. If she does not have an arguable case, it is not in the interests of justice to grant an extension.

---

[3] The Federal Court set out this test in *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 833.
[4] The Federal Court of Appeal outlined this test in *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[5] See telephone log dated December 12, 2021.

[19] The Claimant argues that the General Division made an important error of fact. She says that she explained many times that she relied on the expertise of Service Canada agents when she applied for benefits. Her English is limited and she had not experience with EI claims.

[20] The Claimant says that she was told by an agent that she did not need to provide any further documents from her employer because the Commission will also receive them. For this reason she didn't forward anything further to Service Canada and, eighteen months later she was asked to pay back an overpayment. She says that she tried to comply with all requirements and is now facing financial hardship. She says that she cannot pay the overpayment.

[21] There is no arguable case that the General Division made an important error of fact. The General Division considered the Claimant's arguments that the additional severance she received should not be allocated. The General Division applied the proper test and determined that the amount she received was earnings upon separation from her employment.[6]

[22] The General Division found that the Commission properly allocated the separation money to the period from November 17, 2019 to November 13, 2019. It found that the Commission had 36 months after paying EI benefits to reconsider a claim. While the delay in this case was unfortunate for the Claimant, the Commission was entitled to reconsider the claims and complete the allocation when it did.

[23] The General Division found that the Claimant was liable for the overpayment and that it did not have the authority to reduce or write-off the overpayment.

[24] The Claimant is arguing that the General Division made an important error of fact because she was told by an agent that she did not need to provide any further documents after she applied for benefits. This argument does not have a reasonable chance of success on appeal.

---

[6] See General Division decision at para 29.

[25] The Claimant's argument is not relevant to the outcome of the appeal. It is well established that misinformation from the Commission or Service Canada agents does not override the law.[7] Whether or not the Claimant provided the amended ROE to Service Canada does not affect the ability of the Commission to review and amend the claims and complete the allocation within 36 months.

[26] The Claimant has not shown a continuing intention to appeal or a reasonable explanation for the delay. The Claimant also does not have an arguable case on appeal.[8] For these reasons, I am not granting an extension of time.

Conclusion

[27] An extension of time is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division

---

[7] *Granger v. Canada Employment and Immigration Commission*, 1986 CanLII 3962 (FCA), [1986] 3 FC 70 at para 7.
[8] The Federal Court and Federal Court of Appeal have given particular weight to the arguable case factor, see for example *McCann v Canada (Attorney General),* 2016 FC 878, and *Maqsood v Canada (Attorney General),* 2011 FCA 309.