



Citation: *XN v Canada Employment Insurance Commission*, 2022 SST 1262

Social Security Tribunal of Canada Appeal Division

Extension of Time Decision

Applicant: X. N.
Representative: R. Z.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 11, 2022
(GE-22-648)

Tribunal member: Stephen Bergen

Decision date: November 10, 2022

File number: AD-22-686

Decision

[1] I am refusing the extension of time to apply for leave (permission) to appeal. I will not consider the application for leave to appeal.

Overview

[2] The Applicant, X. N., is the Claimant in this case. The Respondent, the Canada Employment Insurance Commission (Commission), decided that she was not entitled to Employment Insurance (EI) regular benefits because she said that she was not available for work.

[3] When the Claimant applied for EI benefits, she corrected herself and told the Commission that she was available for work. She collected benefits from September 27, 2020, to August 7, 2021. The Commission later reviewed her claim and told her that she could not receive regular benefits after January 10, 2021. It allowed that she had been entitled to 15 weeks of sickness benefits starting September 27, 2020. However, it asked her to pay back the benefits she had received for the period after January 10, 2021.

[4] When the Claimant asked the Commission to reconsider, it would not change its original decision. The Claimant appealed the reconsideration decision to the General Division. She argued that she had been available for work after January 10, 2021, and that she was entitled to the benefits paid to her.

[5] The General Division agreed with the Commission's decision and dismissed the Claimant's appeal. The Claimant asked the General Division to correct its decision, but it refused. Next, the Claimant wrote to the Commission to explain why she thought she should be entitled to benefits. The Commission forwarded her letter to the Appeal Division, which interpreted it as an application to appeal the General Division decision.

[6] However, the application was late. I am refusing an extension of time, and I will not be considering the Claimant's appeal. I am not satisfied that it is in the interests of justice for me to consider the late appeal.

Analysis

The application was late

[7] The first question I must decide is whether the application for leave to appeal was late.

[8] The law says that an applicant must file the Application to the Appeal Division within 30 days of the date that they received the General Division decision.¹

[9] The Claimant started her appeal to the General Division by filing a Notice of Appeal form. In the form, she provided an email address and confirmed that the General Division should send correspondence and documents by email.

[10] The General Division issued its decision on April 11, 2022, and it emailed the decision to the Claimant on the same day.

[11] The law says that a decision is “deemed to have been communicated” on the next business day after the day it is sent by email.² That means that I may presume that the Claimant received the General Division decision on the next business day after it was emailed to her, unless she can show that she received it on some other day.

[12] The next business day after April 11, 2022, is April 12, 2022.

[13] On October 22, 2022, I wrote to the Claimant’s representative to ask when the Claimant had actually received the General Division decision. The Claimant’s representative responded to my letter on October 24, 2022. He did not dispute that the Claimant had received the decision by April 12, 2022.

[14] I find that the decision was communicated to the Claimant (through her representative) on April 12, 2022.

¹ See section 57(1) of the *Department of Employment and Social Development Act* (DESD Act).

² See section 19(1)(c) of the *Social Security Tribunal Regulations*.

[15] Now I must decide when the Claimant filed her application with the Appeal Division.

[16] The Claimant wrote to the Commission on September 13, 2022, to express her dissatisfaction with the “result which [it] made on [her] case.”³ A Service Canada Centre received this letter on September 14, 2022. Service Canada forwarded the letter to the Social Security Tribunal (Tribunal), and it arrived on September 28, 2022. The Appeal Division accepted this letter as an expression of the Claimant’s intention to appeal the General Division decision.

[17] When I wrote to the Claimant’s representative, I also asked him to explain any delay between when the General Division sent the decision and when the Claimant received it. The representative did not respond to that question directly, but he did mention an “appeal sent in [*sic*] April 28th along with an appeal form sent to the Appeal Division.”⁴

[18] I reviewed the Tribunal’s files and confirmed that the Claimant’s representative emailed the Tribunal on April 28, 2022. An appeal form was not attached to the email, and the email did not otherwise express an intention to appeal. Instead, the representative stated his belief that the General Division decision had gotten certain facts wrong. He asked the Tribunal to “clarify” those facts.

[19] In response to the April 28, 2022, email, the General Division sent a letter to the representative on May 10, 2022. It denied the Claimant’s request to correct its decision. It also directed the representative to review the cover letter that was sent with the original General Division decision. The General Division stated that its earlier cover letter included information on how to apply for leave to appeal to the Appeal Division.

[20] I find that the Claimant’s September 13, 2022, letter is the first expression of her intention to appeal the General Division decision to the Appeal Division. I accept that this letter is the Claimant’s application to the Appeal Division.

³ See AD1-1.

⁴ See AD1B-2.

[21] It is possible that the Claimant expected the Tribunal to accept her April 28, 2022, email as her application to appeal the General Division decision to the Appeal Division. However, the General Division's May 10, 2022, letter makes it clear that it was not treating that email as an appeal application. The Tribunal did not receive any other correspondence from her or her representative between the April 28, 2022, email and the day it received the September 13, 2022, letter.

[22] Service Canada acts as an agent for the Commission. With that in mind, I accept that the Commission received the September 13, 2022, letter on September 14, 2022, which is the same day that Service Canada received it.

[23] I find that the Appeal Division received the letter on September 14, 2022, as well. While the Tribunal is distinct from the Commission, the Commission chose to forward the Claimant's letter to the Tribunal directly. It did not redirect the Claimant to file with the Tribunal. Because of this, the Claimant should not be prejudiced by the delay between when Service Canada received the letter and when the Tribunal received it.

[24] The deadline to file the application was 30 days from April 12, 2022, which is May 12, 2022. The Appeal Division received the application on September 13, 2022. Therefore, the Claimant's application was late by approximately four months.

I am not extending the time for filing the application

[25] 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?⁵

[26] The importance of each factor may be different depending on the case. Above all, I have to consider whether I would be serving the interests of justice by granting the extension.⁶

– **Continuing intention**

[27] The General Division told the Claimant how to ask for leave to appeal when it sent her the decision on April 11, 2022. It reminded her how to ask for leave in its May 10, 2022, refusal to correct its decision.

[28] The Claimant sent a letter to the Commission on September 13, 2022, which the Appeal Division received and accepted as expressing her intention to appeal.

[29] Neither the Claimant nor her representative contacted the Commission or the Tribunal at any time between the May 12, 2022, deadline to file an application with the Appeal Division and September 13, 2022.

[30] When I wrote to the Claimant's representative on October 22, 2022, I asked whether the Claimant could identify any steps that she had taken which might show that she had always intended to apply. The Claimant responded to the letter on October 24, 2022, but she did not answer this question.

[31] I do not accept that the Claimant had a continuing intention to appeal throughout the delay.

[32] My finding on this factor weighs against allowing the extension of time.

– **Reasonable explanation**

[33] In my letter to the Claimant's representative, I also asked whether the Claimant had a reasonable explanation for the delay.

⁵ The Federal Court set out this test in *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 833.

⁶ The Federal Court of Appeal outlined this test in *Canada (Attorney General) v Larkman*, 2012 FCA 204.

[34] It is not clear whether the Claimant answered this question. However, she did describe the April 28, 2022, letter to the Tribunal as an “appeal,” and she said that she had sent an appeal form. This suggests a possible explanation: The Claimant may have thought she had filed her appeal on April 28, 2022.

[35] However, there is no indication in the Tribunal’s file that it received an appeal form with the April 28, 2022, email. The General Division did receive the email, but that email did not refer to, or include, an appeal form. In the email, the Claimant asked the General Division to “clarify” certain findings of fact in the General Division decision.

[36] The General Division responded to the Claimant on May 10, 2022, as though the Claimant was asking it to correct its decision. It denied that request. It also reminded the Claimant of the correct process to file an appeal of the General Division decision.

[37] After receiving the General Division’s letter, the Claimant waited another four months before writing to the Commission. If she intended to appeal the General Division decision, she has not explained why she waited so long.

[38] I do not accept that the Claimant has a reasonable explanation for the delay. My finding on this factor weighs against allowing the extension of time.

– **Unfairness to another party**

[39] The only other party to this appeal is the Commission.

[40] The Commission is aware that the timeliness of the Claimant’s application was at issue. When I asked the Claimant’s representative for additional information about whether and why her application was late, I sent the Commission a copy. The Commission also received a copy of the Claimant’s response.

[41] The Commission has not taken any position on this issue.

[42] In the absence of argument or evidence, I will not speculate on how the Claimant’s delay may have been unfair to the Commission. I find that the lateness of the application for leave to appeal was not unfair to the Commission.

[43] My finding on this factor weighs in favour of allowing the extension of time.

– **Arguable case**

[44] Finally, I must consider whether the Claimant has an arguable case. An arguable case would be some argument on which the Claimant could possibly be successful in her appeal.

[45] For the Claimant's application for leave to appeal to succeed, her reasons for appealing have to fit within the "grounds of appeal." I can grant leave to appeal only if there is an arguable case that the General Division made one or more of the following errors:⁷

- a) The General Division hearing process was not fair in some way.
- b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
- c) The General Division based its decision on an important error of fact.
- d) The General Division made an error of law when making its decision.

[46] In her September 13, 2022, letter, the Claimant did not clearly identify what error she thought the General Division had made.

[47] I set out the grounds of appeal in my October 22, 2022, letter to the Claimant. I also asked her for more information about why she thought the General Division had made any of the kinds of errors described in the grounds of appeal.

[48] In her response, the Claimant said that the General Division had made an error of procedural fairness and an important error of fact. Her procedural fairness concern seems to be a concern with the quality of the interpretation. The "error of fact" is related: She believes the General Division misunderstood the evidence about "K.."

⁷ This is a plain language version of the three grounds. The full text is in section 58(1) of the DESD Act.

Unfair process

[49] If the Claimant was unable to make herself understood at the hearing, this would interfere with her right to be heard. That would be unfair.

[50] However, the General Division was aware that this could be a problem. It devoted several paragraphs of its decision to explaining how it ensured that the Claimant would be understood during the hearing. It noted that the Claimant could speak and understand English but was not confident that her English was good enough for the purpose of a hearing. Therefore, the General Division arranged for her to testify through an interpreter. The interpreter was also instructed to translate all the member's comments and questions to the Claimant.

[51] Furthermore, the Claimant was represented at the hearing. Her representative was fluent in English. He confirmed at the hearing that he fully understood what the interpreter said in Mandarin.

[52] In the course of the hearing, neither the Claimant nor her representative raised any objection with the quality of the interpretation.

[53] There is no arguable case that the Claimant was unable to make herself understood at the hearing or that the hearing was unfair because of the quality of the interpretation.

Important effort of fact

[54] The General Division understood that the Claimant wanted to apply at "K.," as though K. was a business or personal employer. It also understood that the Claimant had spoken with a counsellor in France about helping her find jobs.

[55] The Claimant says that the General Division was mistaken about these facts. She says that K. is the name of the counsellor who was helping her find work and that K. was in British Columbia.

[56] There is no arguable case that the General Division made an important error of fact.

[57] The General Division decision accurately represents what the interpreter said about K.. When the interpreter related what the Claimant had said about K., she said that the Claimant wanted to apply at a company called K.. The interpreter also said that she had asked the Claimant to spell the name of the “company.”⁸ The Claimant’s representative did not correct the interpreter during the hearing.

[58] There is one instance where the interpreter was speaking for the Claimant, and it sounds to me like she said, “I was speaking to my counsellor and friends.” However, her accent is such that the member may have heard it as “my counsellor in France.”⁹

[59] Even if the interpreter mistranslated what the Claimant had said about K., or if the General Division member misheard the one detail, this evidence was not important to the General Division decision.

[60] There can be an arguable case that the General Division made an important error of fact only if it **based its decision** on a finding of fact that ignored or misunderstood the evidence.¹⁰ The General Division did not base its decision on who or what K. was, or where K. was located.

[61] The General Division decided that the Claimant was not entitled to benefits because she had not made enough of an effort to find work between January 10, 2021, and December 1, 2021. It said that it relied on the Claimant’s initial statements to the Commission, which it said were consistent with the medical evidence on file. It said that this evidence speaks to her condition and her inability to work until November 1, 2021.¹¹

[62] The Claimant’s application does not make out an arguable case.

[63] This final factor weighs against allowing the extension of time.

⁸ This may be found by listening to the audio recording of the General Division hearing at 0:54:00.

⁹ This may be found by listening to the audio recording of the General Division hearing at 0:58:42.

¹⁰ See section 58(1) of the DESD Act.

¹¹ See the General Division decision at paragraph 34.

– **Summary of extension of time factors**

[64] I have considered all of the factors. The Claimant has not shown that she had a continuing intention to appeal, has not provided a reasonable explanation for the delay, and has not made out an arguable case. The only factor in her favour is that it would not be unfair to the Commission if I granted an extension.

[65] Given my findings on these factors, I am not satisfied that an extension of time is in the interests of justice.

Conclusion

[66] I am refusing the extension of time. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division