Citation: *DH v Canada Employment Insurance Commission*, 2022 SST 1385

Social Security Tribunal of Canada
Appeal Division

Extension of Time Decision

Applicant:	D. H.
Representative:	
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated September 6, 2022 (GE-22-2562)

Tribunal member:	Stephen Bergen
Decision date:	November 21, 2022
File number:	AD-22-756

Decision

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

Overview

[2] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Applicant, D. H. (Claimant), did not qualify to receive Employment Insurance (EI) benefits because he had not accumulated enough hours of insurable employment in his qualifying period. When the Claimant asked the Commission to reconsider, the Commission would not change its original decision.

[3] Next, the Claimant appealed the reconsideration decision to the General Division but the appeal was late. The General Division refused to consider the late appeal. It did not accept that the Claimant had a continuing intention to appeal, a reasonable explanation for the delay, or that he had made out an arguable case. Therefore, the General Division decided that it was not in the interests of justice to allow the appeal to proceed.

[4] The Claimant is now applying to the Appeal Division for leave to appeal the General Division's refusal to consider his appeal.

[5] However, the Claimant's application to the Appeal Division is also 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 the Appeal Division to consider the late appeal.

Analysis

The application was late

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

[7] 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]

[8] In his Application to the Appeal Division, the Claimant did not say when he actually received the General Division decision. I wrote the Claimant on November 5, 2022, to ask him about this. I gave the Claimant until November 18, 2022, to respond, but he did not respond.

[9] The Applicant started his appeal to the General Division by filing a Notice of Appeal form. In the form, he provided an email address and confirmed that the General Division should send correspondence and documents by email.[2]

[10] The General Division issued the decision and sent it to the Claimant on September 6, 2022, by email.

[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.[3] That means that I may presume that the Claimant received the General Division decision on the next business day after the General Division emailed it to her, unless the Claimant can show that she received it on some other day.

[12] The next business date after September 6, 2022 is September 7, 2022.

[13] In the absence of evidence to the contrary, I find that the General Division communicated the decision to the Claimant on September 7, 2022.

[14] The Claimant dated his Application to the Appeal Division on October 17, 2022, but the Appeal Division only received it on October 20, 2022.

[15] The deadline to file the application was 30 days from September 7, 2022, which is October 7, 2022. The Claimant's application is late.

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[1] See section 57(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] See GD2-2.
[3] See section 19(1)(c) of the *Social Security Tribunal Regulations*.

I am not extending the time for filing the application

[16] The Application to the Appeal Division asks applicants to explain why their appeal is late. In the space provided, the Claimant wrote that, "[he] is appealing because of the time it took for [him] to get all the information."[4]

[17] The Claimant made the same argument to justify his late appeal to the General Division, so I cannot be certain that he meant this as an explanation for why his appeal to the Appeal Division was late. It is also possible that he is trying to explain why the General Division decision was incorrect; that is, that it had not understood that he was waiting for information and should have allowed the late appeal to proceed.

[18] However, nothing else that the Claimant wrote in his Application to the Appeal Division could have been an explanation for why he was late applying to the Appeal Division. And he did not respond to my request that he elaborate on why his application was late. So I will assume that the Claimant's reason for applying late to the Appeal Division has to do with the time it took him to obtain information.

[19] When deciding whether to grant an extension of time, I have to consider the same factors that the General Division considered in its decision. I must consider:

1. Was there a continuing intention to pursue the application?
2. Is there a reasonable explanation for the delay?
3. Is there prejudice to the other party?
4. Does the application disclose an arguable case?[5]

[20] 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.[6]

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[4] See AD1-5.
[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.

– Continuing intention and reasonable explanation

[21] The Claimant's Application to the Appeal Division is less than two weeks late. Nonetheless, there is nothing in the record to suggest that he took any steps to pursue his appeal until he finally filed the application. He has not said what his circumstances were during that time, or what he was thinking. He says he was "gathering information", but there is no other evidence from which I might infer that he formed an intention to appeal the General Division decision. Or, that he maintained a "continuing intention" to appeal from the date he received the General Division decision.

[22] I do not accept that "gathering information" demonstrates a continuing intention to appeal and I do not accept it as a reasonable explanation for the delay. The Claimant gave the same explanation to the General Division for his late appeal there. The General Division found that "waiting for information" was not a reasonable explanation for his delay in filing the appeal. The Claimant did not give the General Division copies of the documents that he had been waiting for, and he did not explain how the information would be relevant to his appeal. The General Division rejected the Claimant's explanation because it could not evaluate the relevance of whatever it was that the Claimant was waiting for.

[23] Even though the General Division explained all of this in its reasons, the Claimant is now asking the Appeal Division to accept the very same reason for applying late to the Appeal Division. Once again, he says he is gathering information but has not said what information he means to gather, or how it is relevant to his appeal. He has not explained why he let another appeal deadline pass while he was waiting for information, even though the General Division had already told him that this was not a reasonable explanation for delaying his appeal. In light of this, he should have known that it would be prudent to file his application on time, even if he did not have all the evidence he hoped to submit.

[24] I find that the Claimant has not demonstrated a continuing intention to appeal or offered a reasonable explanation for his late application to the Appeal Division.

[25] My findings on these two factors weigh against allowing the extension of time.

– Unfairness to another party

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

[27] The Commission is aware that the timeliness of the Claimant's application is an issue. When I wrote the Claimant to ask him why his application was late, I copied my request to the Commission. The Commission has not taken any position on this issue.

[28] In the absence of argument or evidence, I will not speculate on how the Claimant's delay results 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.

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

– Arguable case

[30] 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 his appeal.

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

1. The General Division hearing process was not fair in some way.
2. 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).
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[7] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[32] The only type of error that the Claimant identified in his Application to the Appeal Division is the error concerned with an important error of fact.

[33] An "important error of fact" is where the General Division bases its decision on an error of fact.[8] Generally speaking, an error of fact is a finding of fact that overlooks or misunderstands relevant evidence.

[34] In considering the "arguable case" factor in this case, I am only considering whether there is an arguable case that the General Division based its **refusal to consider the late appeal** on a finding that overlooked or misunderstood relevant evidence.

[35] In his Application to the Appeal Division, the Claimant said two things. First, he said that he is appealing because of the time it took him to get all the information. Second, he said that he missed days of work because of a Covid 19 protocol and that he was seven hours short of the hours required to qualify.

Time to get information

[36] The General Division based its decision, in part, on its finding that the Claimant did not have a reasonable explanation for his delay.

[37] The Claimant has not said what he thinks the General Division got wrong about his explanation. He did not point to any evidence that the General Division overlooked or misunderstood.

[38] However, the Claimant appears to believe that the General Division did not understand that he was waiting for information, or that it missed evidence that could explain why he needed to delay his appeal.

[39] It is clear that the General Division understood that the Claimant was waiting for information, including documents from an employer. The General Division simply did not

[8] This is a paraphrase of section 58(1)(c) of the DESDA. The section actually describes the error as one where, "the General Division based its decision on an erroneous finding of fact that it mad in a perverse or capricious manner or without regard for the material before it."

accept this as reasonable explanation. It could not determine if those documents were relevant because there was "no indication of the nature of his calls or what information he was waiting for" and "no new evidence or information from a past employer included in his appeal..."[9]

[40] It seems that the Claimant simply disagrees with the weight that the General Division gave to his evidence, or with its conclusion that his explanation was not reasonable. However, it is not the role of the Appeal Division to reweigh the evidence and come to a different result on the same facts.[10]

[41] There is no arguable case that the General Division overlooked or misunderstood the Claimant's evidence that he was waiting for information.

Hours to qualify

[42] The Claimant was appealing the Commission's decision that he not qualify for benefits because he did not have enough hours of insurable employment in his qualifying period. The Claimant argued that he was short by only seven hours, and he was only short because of Covid 19.

[43] The General Division based its decision in part on its finding that the Claimant did not have an arguable case that the Commission's decision was incorrect.

[44] In finding as it did, the General Division noted that the Claimant required 420 hours, but that he had only accumulated 417 hours within the qualifying period.[11] It also noted that he missed four days of work because he had Covid 19, and that he would have had sufficient hours if he had not missed these days.[12]

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[9] See General Division decision, AD1A-6, at paras 29 and 30.
[10] See for example the decisions of the Federal Court in *Rouleau v Canada (Attorney General)* 2017 FC 534; and of the Federal Court of Appeal in *Quadir v Canada (Attorney General)* 2018 FCA 21.
[11] See General Division decision, AD1A-6, at para 19.
[12] See General Division decision, AD1A-6, at para 17.

[45] The Claimant did not dispute any of these facts. He has not identified what evidence the General Division overlooked or misunderstood related to his shortfall of hours.

[46] The General Division correctly observed that it had no discretion to disregard the requirements of the *Employment Insurance Act*. Without 420 hours in his qualifying period, the Claimant could not qualify for benefits. It did not matter that he was only seven hours short, and it did not matter that he was seven hours short because he was sick with Covid 19.[13]

[47] The Claimant is now saying that it was not "his decision" to miss work and that he missed days of work because of a Covid 19 "protocol."[14] The General Division decision does not mention anything about a Covid 19 "protocol."

[48] I do not see how the existence of a "protocol" would have made any difference to the General Division's finding that the Claimant had not made out an arguable case that he had enough hours to qualify. However, I do not need to consider the relevance of any protocol. If there was a government or employer protocol that prevented the Claimant from working when he was sick, I can find no evidence of it in the General Division record. The General Division could not have overlooked evidence that it did not have.

[49] The first time the Claimant mentioned a protocol is in his Application to the Appeal Division. He had not mentioned it in his Request for Reconsideration: He said only that he missed 4 days "due to Covid 19".[15] When he spoke to the Commission on June 14, 2022, he said the same thing.[16] In his Notice of Appeal (General Division), he spoke only of having missed days due to "contracting" Covid 19.[17]

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[13] See General Division decision, AD1A-6, at para 21.
[14] AD1-5.
[15] See GD3-23.
[16] See GD3-25.
[17] See GD2-4.

[50] Therefore, the Claimant's mention of a Covid 19 protocol is new evidence. With rare exceptions, the Appeal Division is not able to consider new evidence.[18] None of those exceptions applies here, and I will not consider the Claimant's assertion that he missed days of work due to a protocol.

[51] In deciding whether to allow the appeal to proceed, the General Division had to consider four factors. It had to consider whether the Claimant had a continuing intention to appeal, a reasonable explanation for his delay, whether there was prejudice to another party, and whether he had made out an arguable case that the Commission's reconsideration decision was incorrect. I cannot find an arguable case that the General Division overlooked or misunderstood any evidence when it considered any of these factors.

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

– **Summary**

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

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

Conclusion

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

Stephen Bergen
Member, Appeal Division

[18] See the Federal Court decisions in *Hideq v. Canada (Attorney General), 2017 FC 439,* and in *Parchment v. Canada (Attorney General), 2017 FC 354.* The exceptional circumstances in which the Appeal Division may consider new evidence are the same as those identified in the Federal Court of Appeal decision, *Sharma v. Canada (Attorney General), 2018 FCA 48.*