

Federal Court



Cour fédérale

**Date: 20210914**

**Docket: T-1688-19**

**Citation: 2021 FC 946**

**Ottawa, Ontario, September 14, 2021**

**PRESENT: The Honourable Mr. Justice Lafrenière**

**BETWEEN:**

**NIJABAT CONTRACTING INC.**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This is an application for judicial review of a decision of a member of the Social Security Tribunal Appeal Division [SST-AD] dated September 13, 2019 [Decision] denying the Applicant's application for extension of time to apply for leave to appeal a decision of the General Division of the Social Security Tribunal [SST-GD] rendered on July 31, 2018.

[2] I pause here to note that the Decision being challenged by the Applicant was made by the SST-AD. I fail to see any valid basis to name the Canada Employment Insurance Commission [CEIC] as a respondent, particularly since the proper respondent, the Attorney General of Canada, is already named. Therefore, the style of cause is amended with immediate effect to remove the CEIC as a named respondent.

## II. Background Facts

[3] By way of background, in 2016, the CEIC imposed a penalty on the corporate Applicant for misrepresentations related to a fraudulent record of employment issued to an employee.

[4] The Applicant asked the Commission to reconsider the decision and penalty on the basis that the employee in question had worked for the company and was paid for her work in cash. The Commission maintained its decision to impose a penalty upon the Applicant for knowingly providing false information, but reduced the penalty from \$16,888.00 to \$15,277.00.

[5] The Applicant appealed the reconsideration decision to the SST-GD, which concluded that a penalty had to be imposed upon the Applicant pursuant to subsection 39(1) of the *Employment Insurance Act*, SC 1996, c 23 for knowingly making false representations in connection with the record of employment. The SST-GD decision rendered on July 31, 2018 was sent to the Applicant along with a cover letter on August 1, 2018. The letter stated in part as follows:

Any party to the appeal, who wishes to appeal the General Division's decision, may request permission to appeal to the Appeal Division of the Tribunal. This is done by submitting an

application for leave to appeal to the Appeal Division within 30 days of the decision being communicated.

[6] A representative of the Applicant contacted the SST-AD on August 23, 2018, to obtain a leave to appeal form [LTA]. The LTA form was sent to the Applicant's email address.

[7] On July 9, 2019, a representative of the Applicant called requesting information on appealing the SST-GD decision.

[8] On August 29, 2019, the Applicant's Chief Executive Officer [CEO], Furqan Khan, submitted an application to the SST-AD seeking leave to appeal the SST-GD decision. In Part 6 of the LTA form, the Applicant provided the following explanation for the delay in seeking leave (spelling errors are those of the Applicant):

During the major clean up on July 31, 2019 I found the package.  
As i see it i am submitting the appeal with in the 30 days after I recieved it.

### III. The SST-AD Decision

[9] In refusing the application for extension of time, the SST-AD noted that a representative of the Applicant had called on July 9, 2019, requesting information on appealing the SST-GD decision, which is inconsistent with the Applicant's statement that the package was only discovered on July 31, 2019. The SST-AD also noted that the SST-GD decision was communicated to the Applicant on or before August 23, 2018 and that the Applicant filed an application for leave to appeal on August 29, 2019.

[10] The SST-AD concluded that it had no choice but to refuse to grant the Applicant an extension of time to apply for leave to appeal in light of subsection 57(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [DESD Act]. The provision states that while the SST-AD may allow further time within which an application for leave to appeal may be filed “in no case may an appeal be brought to the Appeal Division more than one year after the day on which the General Division’s decision is communicated to the appellant.”

[11] The member of the SST-AD concluded that the application for leave was filed more than one year after the date that the decision was communicated to the Applicant. The member also concluded that the DESD Act does not permit any discretion to be applied. The application for extension of time to apply for leave to appeal was accordingly refused.

#### IV. Issue

[12] The sole issue before the Court on this application is whether it was reasonable for the Appeal Division not to grant an extension of time to appeal.

#### V. Admissibility of the Applicant’s Affidavit

[13] The Applicant filed the affidavit of Mr. Khan in support of the application for judicial review. Mr. Khan simply attaches to his affidavit four documents that are said to have been delivered by hand to the Respondent and Service Canada on November 14, 2019. They include a letter signed by Mr. Khan as CEO of the Applicant to the SST-AD dated September 29, 2019 explaining that Mr. Khan was suffering from short-term memory loss as the result of an injury

suffered after falling and hitting his head on concrete in April 2018. Mr. Khan writes that he only remembers finding the package on July 31, 2019. Also attached to Mr. Khan's affidavit are medical notes dictated in April 2018 by a doctor at the Brampton Civic Hospital regarding a subarachnoid hemorrhage suffered by Mr. Khan. The notes reflect that they were printed on October 15, 2019.

[14] The Applicant's letter dated September 29, 2019 clearly post-dates the Decision. Moreover, at the hearing of the application, Mr. Khan (who was granted permission to act on behalf of the Applicant) acknowledged that the medical notes were not before the SST-AD when the member made the Decision.

[15] It is trite law that on an application for judicial review, only evidence that was before the administrative tribunal can be placed before the Court, except in very limited circumstances that have not be established here. It follows that the Applicant's letter to the SST-AD dated September 29, 2019 and the medical notes, which contain information available to the Applicant prior to applying for leave to appeal on August 29, 2019, are inadmissible and cannot be considered by this Court.

## VI. Analysis

[16] When reviewing the SST-AD's finding that the appeal was brought more than one year after the date the decision was communicated to the Applicant, the Court's analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are

defensible in respect of the facts and law. I see no error in the finding of fact, which is amply supported by the uncontradicted evidence that was before the SST-AD.

[17] I also see no error in the SST-AD's conclusion that there was no discretion to be applied on the facts of this case. The plain language of subsection 57(2) of the DESD Act makes it clear that the legislative intention is to bar any appeal if the application for leave is submitted more than one year after the SST-GD decision is communicated to the appellant. Mr. Justice Sébastien Grammond confirmed in *Pellettieri v. Canada (Attorney General)*, 2019 FC 1585 at para 7 that “[t]he Act does not permit any discretion to be applied.” This conclusion would be right even on a correctness standard.

## VII. Conclusion

[18] For the above reasons, the application is dismissed.

[19] The Respondent seek its costs in the amount of \$500.00. I see no reason to deviate from the general rule that costs should follow the event. Costs shall therefore be granted to the Respondent in the amount requested.

**JUDGMENT IN T-1688-19**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed.
2. Costs of the application, hereby fixed in the amount of \$500.00, inclusive of disbursements and taxes, shall be paid by the Applicant to the Respondent.
3. The style of cause is amended with immediate effect to remove the Canada Employment Insurance Commission as a named respondent.

“Roger R. Lafrenière”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1688-19

**STYLE OF CAUSE:** NIJABAT CONTRACTING INC. v ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** SEPTEMBER 14, 2021

**JUDGMENT AND REASONS:** LAFRENIÈRE J.

**DATED:** SEPTEMBER 14, 2021

**APPEARANCES:**

Furqan Khan FOR THE APPLICANT  
(ON BEHALF OF NIJABAT CONTRACTING INC.)

James Schneider FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario