Citation: ***Minister of Employment and Social Development v. S. T.,*** **2016 SSTADIS 144**

Date: April 25 2016

File Number: AD-15-1378

Appeal Division

BETWEEN:

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Applicant

and

S. T.

Respondent

Decision by: Hazelyn Ross. Member, Appeal Division

DECISION

[1] The Application for Leave to Appeal is granted.

BACKGROUND

[2] On September 28, 2015 the General Division of the Social Security Tribunal, (the Tribunal), issued a decision in which it found that the Respondent was eligible for the Disabled Contributors Child benefit for the period of September 2012 to December 2012. The Applicant seeks leave to appeal, (the Application), from the decision of the General Division.

GROUNDS OF THE APPLICATION

[3] The issue before the General Division was whether the Respondent had been in full-time attendance at a school or university between September 2012 and December 2012. The General Division Member held that she had been and allowed her appeal. Counsel for the Applicant has submitted that the General Division erred in law and in fact and law when it found that the Respondent was eligible for the Disabled Contributors Child benefit under the *Canada Pension Plan, (CPP).*

THE LAW

What must the Applicant establish on an Application for Leave to Appeal?

[4] The *Department of Employment and Social Development*, (DESD) *Act*, provides the circumstances when the Appeal Division would either grant or refuse leave to appeal. Ss. 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[5] Subsection 58(2) of the *Department of Employment and Social Development*, (DESD), *Act* governs when the Appeal Division can grant leave to appeal. Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success has been equated with an arguable case[1]; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney*

General), 2010 FCA 63. On an Application for Leave to Appeal the hurdle that an applicant must meet is a first, and lower, one than that which must be met on the hearing of the appeal on the merits, however, in order to grant the Application, the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal set out above.

[6] The grounds of appeal are set out at subsection 58(1) of the DESD Act, as follows:-

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

The breaches alleged are of paragraphs b and c of sub-section. 58(1).

ISSUE

[7] The issue is: does the appeal have a reasonable chance of success?

ANALYSIS

Did the General Division err in law?

[8] Counsel for the Applicant submitted that the General Division erred in law. Counsel submits that the e Division "made an error of law that is clear on the face of the record." Counsel stated that the error occurred because, "despite the fact that the Respondent was attending college on a part time basis, the SST-GD found the Respondent eligible for the DCCB for the period September 2012 to December 2012 as the SST-GD considered capacity as a new eligibility criteria."

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1 *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[9] Counsel for the Respondent argued this was an error of law because capacity of an applicant is neither mentioned nor implied in either the CPP or *CPP Regulations* in relation to full-time attendance and eligibility for the DCCB.

ANALYSIS

[10] The statutory provisions which govern eligibility for receipt of the Disabled Contributor's Child Benefit are CPP, section 42 and *CPP Regulations*, section 66. CPP section 42 defines "Dependent Child" for the purposes of the Disabled Contributor's Child Benefit. Subsection 42(1) provides

> "dependent Child" of a contributor means a child of the contributor who
> (a) is less than eighteen years of age'
> (b) is eighteen or more years of age but less than twenty-five years of age and is in full-time attendance at a school or university as defined by regulation, or
> (c) is a child other than a child described in paragraph (b), is eighteen or more years of age and is disabled, having been disabled without interruption since the time he reached eighteen years of age or the contributor dies, whichever occurred later.
>
> "disabled contributor's child" or any form of that expression of like import means a dependent child of a contributor who is disabled, but does not include a dependent child described in paragraph (c) of the definition "dependent child" in this section.

[11] Section 66 of the CPP Regulations provide as follows:-

> **66. (1)** For the purposes of paragraph (b) of the definition "dependent child" in subsection 42(1) of the Act, "full-time attendance at a school or university" means full-time attendance at a school, college, university or other educational institution that provides training or instruction of an educational, professional, vocational or technical nature and a dependent child shall be deemed to be or to have been in full- time attendance at a school or university during an absence by reason of a normal period of scholastic vacation. (SOR/90-829, s. 30.)

[12] Counsel for the Applicant has submitted that while the General Division recognised that the Respondent had not been in full-time attendance during the period in question, nonetheless, the General Division Member, went on to find that as the Respondent had had to modify her course load as a result of learning challenges she was to be recognised as a full-time student.

[13] The Appeal Division finds that given the Member's conclusions and the definition of full-time attendance in section 66 of the Regulations, the Applicant has raised an arguable case.

CONCLUSION

[14] The General Division found that the in the period September 2012 to December 2012 the Respondent had been attending college on a full-time basis. Counsel for the Applicant submitted that the conclusion of the General Division gave rise to an error of law as well as an error of fact and law. Having examined the Tribunal record, the applicable law, as well as the decision of the General Division, the Appeal Division is satisfied that the Applicant has raised grounds of appeal that would have a reasonable chance of success.

[15] Leave to appeal is granted.

Hazelyn Ross
Member, Appeal Division