Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. B. v. Minister of Employment and Social Development*, 2018 SST 84

Tribunal File Number: AD-17-867

BETWEEN:

D. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: January 29, 2018

Canada

DECISION AND REASONS

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant, D. B., was born in April 1943 and applied for a Canada Pension Plan (CPP) retirement pension in August 2015. The Respondent, the Minister of Employment and Social Development (Minister), approved the application with a first payment date of September 2014, which it determined was the maximum period of retroactivity permitted under the law.

[2] On December 22, 2016, Mr. D. B. filed an appeal with the General Division of the Social Security Tribunal, asking that his CPP retirement pension be "back paid" to the month after he turned 65. In a letter dated December 30, 2016, the Tribunal advised Mr. D. B. that his appeal was incomplete, since he had failed to provide a copy of the reconsideration decision being appealed and the date it was communicated to him.

[3] At that point, Mr. D. B. had not yet asked the Minister to reconsider its decision. He subsequently did so and, on April 20, 2017, the Minister issued a letter denying the request for reconsideration. On August 24, 2017, Mr. D. B. filed the missing information, at which time the appeal was declared complete.

[4] In a decision dated October 12, 2017, the General Division found that Mr. D. B.'s appeal was late, having been filed and perfected after the 90-day deadline. Although it found that Mr. D. B. had a continuing intention to pursue the appeal, it concluded that it would be contrary to the interests of justice to allow an extension of time for an appeal that had no reasonable chance of success.

[5] On November 6, 2017, Mr. D. B.'s authorized representative submitted an application requesting leave to appeal from the Appeal Division. He argued that the Minister, in its capacity as fiduciary, was in default of its duty of care to Mr. D. B. by failing to make a reasonable effort to contact him about his rights under the *Canada Pension Plan*. He further criticized the

Minister for refusing to make amends and simply pay his client further retroactive CPP retirement benefits. He alleged that the General Division disregarded a principle of natural justice when it refused Mr. D. B. an extension, despite his efforts to file his appeal on time.

[6] Having reviewed the General Division's decision against the underlying record, I have concluded that Mr. D. B. has not advanced any grounds of appeal that would have a reasonable chance of success.

ISSUES

[7] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[1] but the Appeal Division must first be satisfied that the appeal has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[8] I must determine whether Mr. D. B. has an arguable case on the following issues:

Issue 1: Did the General Division err in refusing Mr. D. B. an extension of time to appeal?

Issue 2: Did the General Division apply the correct test in determining that Mr. D. B.'s appeal disclosed no arguable case?

ANALYSIS

Issue 1: Did the General Division err in refusing Mr. D. B. an extension of time to appeal?

[9] Under paragraph 52(1)(*b*) of the DESDA, an appeal must be brought to the General Division in the prescribed form and manner and within 90 days after the Minister's

[1] DESDA at subsections 56(1) and 58(3).
[2] *Ibid*. at subsection 58(1).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

reconsideration decision was communicated to the appellant. Under subsection 52(2), the General Division may allow further time within which an appeal may be brought. Use of the word "may" confers a measure of discretion upon the General Division, although that discretion is not absolute. *Canada v. Gattellaro*[4] requires a decision-maker to consider and weigh four criteria when deciding whether to grant an extension. According to *Canada v. Larkman*,[5] the overriding consideration is that the interests of justice be served.

[10] I see no arguable case that the General Division did anything but exercise its discretion judicially and within the constraints of *Gattellaro* and *Larkman*. Mr. D. B. does not dispute that his appeal was filed with the General Division after the 90-day limit, and I see no arguable case that the General Division negligently weighed the four *Gattellaro* factors. Mr. D. B. did not offer an explanation for the delay in his appeal, but the General Division was able to infer that he demonstrated a continuing intention to pursue the appeal, and it saw little risk that the Minister's interests would be prejudiced by keeping the appeal alive. However, the General Division ultimately determined that the interests of justice would not be served by allowing an extension of time for an appeal that was bound to fail. In making these determinations, the General Division was acting within its jurisdiction as finder of fact to weigh the evidence before it and make a decision based on its interpretation of the law.

Issue 2: Did the General Division apply the correct test for no arguable case?

[11] As noted above, "arguable case" is a phrase that is seen in the jurisprudence surrounding the Appeal Division's right to refuse leave, and it also plays a role in the General Division's powers of summary dismissal. In both scenarios, an appeal may be halted if there is no reasonable chance of success. This has been consistently held to be a fairly low threshold to meet, permitting dismissal only if there is so little merit to the appeal that it is plain and obvious that it is certain to fail. This requires the decision-maker to distinguish between an "utterly hopeless" and a merely "weak" case. In the latter instance, the evidence or legal framework in support of a position might be flimsy but it nonetheless exists in some form, whereas in an "utterly hopeless" case, there is nothing in fact or law underpinning it, and the outcome is "manifestly clear."

---

[4] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[5] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[12] In this case, the General Division's use of the words "doomed to fail" suggests that it applied the correct legal test. Was Mr. D. B.'s appeal, in fact, doomed? I do not see an argument otherwise. As the General Division noted, subsection 67(3) of the CPP stipulates that the retirement pension commences the latest of: (a) the twelfth month before the month after the month in which the application was filed; (b) the month in which the applicant reached the age of 65; or (c) a month chosen by the applicant. Parliament has seen fit to impose non-discretionary limits on retroactive payment of the CPP retirement pension, and I see nothing to indicate that the General Division applied this provision incorrectly.

[13] The General Division also determined—correctly, in my view—that it lacked the jurisdiction to consider extenuating circumstances such as Mr. D. B.'s claim that he spent much of his time out of the country. Similarly, Mr. D. B.'s argument that the Minister has a duty to actively notify potential CPP recipients of their entitlements is beyond my purview. Both the General Division and the Appeal Division are limited to the powers conferred by their enabling legislation—in this case, the DESDA. We lack the authority to simply ignore the letter of the law and order a solution that we think is fair. Such power, known as "equity," has traditionally been reserved to the courts, although they will typically exercise it only if there is no adequate remedy at law. *Canada v. Tucker*,[6] among many other cases, has confirmed that an administrative tribunal is not a court but a statutory decision-maker and, therefore, not empowered to provide any form of equitable relief.

CONCLUSION

[14] As Mr. D. B. has not identified any grounds of appeal that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	Kristopher McEvoy, for the Applicant

[6] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.