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

Citation: *M. H. v Minister of Employment and Social Development*, 2019 SST 1053

Tribunal File Number: AD-19-658

BETWEEN:

M. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: October 18, 2019

DECISION AND REASONS

DECISION

[1] The requests for an extension of time and leave to appeal are refused.

OVERVIEW

[2] The Applicant, M. H., was born in March 1946, and heapplied for a Canada Pension Plan (CPP) retirement pension in June 2017. The Respondent, the Minister of Employment and Social Development (Minister), approved the application with a first payment date of July 2016, which it determined was the maximum period of retroactivity permitted under the law.

[3] The Applicant asked the Minister to reconsider its position and pay him the retirement pension back to 2011, the year he turned 65. He later claimed that he had not applied for retirement benefits earlier because he had been incapacitated from doing so. In a letter dated June 23, 2018, the Minister maintained its position, finding no evidence that the Applicant had met the *Canada Pension Plan*'s criteria for incapacity during the relevant period.

[4] On December 11, 2018, the Applicant appealed the Minister's refusal to pay him more retroactive benefits to the Social Security Tribunal's General Division. The Tribunal advised the Applicant that his appeal was both incomplete and late: it was missing required information and had been submitted beyond the 90-day time limit set out in the *Department of Employment and Social Development Act* (DESDA). On February 7, 2019, the Applicant submitted the missing information, and the Tribunal declared his appeal complete.

[5] In a decision dated March 21, 2019, the General Division found that the Applicant's appeal was late and refused to grant him an extension of time to appeal. Although the General Division found that the Applicant had provided a reasonable explanation for why his appealhad been delayed, it concluded that extending time would serve no purpose, since the appeal did not have a reasonable chance of success.

[6] On September 26, 2019, the Applicant submitted an application requesting leave to appeal to the Appeal Division. In it, the Applicant alleged that the General Division had failed to

observe a principle of natural justice when it refused to extend the filing deadline. The Applicant added that:

- the decision had arrived late because of a postal strike;
- he was not in good condition and had to return home for counselling to help him deal with the loss of his daughter; and
- it took him a long time to find documents that were lost amid terrorism-related displacement.

The Tribunal again advised the Applicant that he had apparently submitted his appeal materials after the DESDA's 90-day filing deadline.

[7] I have reviewed the record and concluded that, since the Applicant's reasons for appealing would no have reasonable chance of success, this is not a suitable case in which to permit an extension of time.

ISSUES

[8] I must decide the following related questions:

Issue 1: Should the Applicant receive an extension of time in which to file his application for leave to appeal?

Issue 2: Does the Applicant have an arguable case on appeal?

ANALYSIS

Issue 1: Should the Applicant receive an extension of time?

[9] According to section 57(1)(b) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[10] The record indicates that the General Division issued its decision on March 21, 2019, and the following day it was sent by regular mail to the Applicant at his residence in Sri Lanka. The Appeal Division did not receive the Applicant's application for leave to appeal until September 26, 2019—more than six months after the decision date and three months after the filing deadline. Even if one liberally assumes 10-day delivery periods, the Applicant's application for leave to appeal was late.

[11] I have concluded that a further extension of time is not warranted in this case. In *Canada v Gattellaro*,[1] the Federal Court set out four factors to consider when deciding whether to allow further time to appeal:

(i) whether there is a reasonable explanation for the delay;
(ii) whether the applicant demonstrates a continuing intention to pursue the appeal;
(iii) whether allowing the extension would cause prejudice to other parties; and
(iv) whether the matter discloses an arguable case.

The weight to be given to each of the *Gattellaro* factors may differ from case to case, and other factors may be relevant. According to *Canada v Larkman*, the overriding consideration is that the interests of justice be served.[2]

(i) Reasonable explanation for the delay

[12] The Applicant blames a postal strike for the delay in submitting his application for leave to appeal. Although he offered no independent evidence that he was affected by such a strike, I am willing to give him the benefit of the doubt on this matter.

[13] In view of all circumstances, including the Applicant's distant location, I find his explanation reasonable.

(ii) Continuing intention to pursue the appeal

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

[14] The record indicates that, in the six months between the issuance of the General Division's decision and the submission of his application for leave to appeal, the Applicant had no contact with the Tribunal. Still, based his comments in his application for leave to appeal, I am willing to accept that the Applicant had a continuing intention to appeal.

(iii) No prejudice to the other party

[15] I find it unlikely that permitting the Applicant to proceed with his appeal at this late date would prejudice the Minister's interests, given the relatively short period of time that has elapsed since the expiry of the statutory deadline. I do not believe that the Minister's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

(iv) No arguable case

[16] Applicants seeking an extension of time must show that they have at least an arguable case on appeal at law. As it happens, this is also the test for leave to appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.[3]

[17] For the reasons that follow, I find that the Applicant has failed to put forward an arguable case on appeal.

Issue 2: Does the Applicant have an arguable case?

[18] Under section 58(1) of the 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.

[19] An appeal may be brought only if the Appeal Division first grants leave to appeal,[4] but the Appeal Division must first be satisfied that the appeal has a reasonable chance of success.[5]

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

The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[6]

[20] I do not see an arguable case for any of the Applicant's submissions.

(i) No arguable case that the General Division erred in finding the Applicant's appeal late

[21] As at the Appeal Division, the Applicant's appeal to the General Division was late. After finding that his appeal was more than three months past the deadline, the General Division declined to allow the Applicant an extension of time. The General Division came to this decision largely because it found that the Applicant lacked an arguable case. Now I have come to a similar conclusion at the Appeal Division.

[22] Under section 52(1)(b) of the DESDA, an appeal must be brought to the General Division within 90 days after the Minister's reconsideration decision was communicated to the appellant. The Applicant has never denied that his appeal was filed with the General Division after the 90-day limit, and I see no indication that the General Division erred in finding it late.

***(ii) No arguable case that the General Division misapplied* Gattellaro**

[23] As I am doing in this decision, the General Division applied the four *Gattellaro* factors to determine whether the Applicant's appeal was worthy of an extension of time.

[24] I see no arguable case that the General Division did anything but exercise its discretion judicially and within the constraints of *Gattellaro* and *Larkman*. Although the General Division doubted that the Applicant had a continuing intention to pursue his appeal, it found that his health problems explained the delay in his appeal and 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 this determination, 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.

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[6] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

(iii) No arguable case that the General Division misapplied the test for arguable case

[25] As noted above, "arguable case" is a phrase that is seen in the jurisprudence surrounding the Appeal Division's discretionary authority to refuse leave, and it is also the standard that is used in one of the four *Gattellaro* factors. In both scenarios, an appeal may be halted if it has 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 a case that is utterly hopeless, as opposed to merely weak.

[26] In this case, the General Division's use of the words "bound to fail"[7] suggests that it applied the correct legal test. Was the Applicant's appeal, in fact, destined for failure? I do not see an argument otherwise. As the General Division noted, section 67(3) of the *Canada Pension Plan* stipulates that the retirement pension ordinarily commences 11 months before the month in which the application was filed. I see nothing to indicate that the General Division applied this rule incorrectly.

(iv) No arguable case that the General Division misapplied the test for incapacity

[27] The one exception to the 11-month rule is when a claimant is incapacitated from making an application, and in this case, the General Division gave full consideration to that possibility. Section 60(8) of the *Canada Pension Plan* sets out the requirements for a finding of incapacity. It allows an application to be deemed to have been made earlier than it was actually made, provided that a claimant can show that he or she was incapable of forming or expressing an intention to apply for the benefit. This standard of incapacity is high, requiring a claimant to show that he or she was not only physically unable to make an application but also unable to form or express an intention to do so. In this case, the General Division considered the available evidence and concluded that the Applicant was capable of forming or expressing an intention to apply between March 2011, when he turned 65, and June 2017, when he finally did submit his application. In doing so, the General Division noted that the Applicant had a history of heart problems, which do not necessarily interfere with mental cognition. More significantly, the

[7] General Division decision, para 16.

General Division found that the Applicant did not submit any medical evidence indicating he lacked capacity. Although the Applicant submitted a declaration of incapacity,[8] the cardiologist who completed it on his behalf said nothing about his ability to form or express an intention to make an application during the relevant period—even though the form expressly invited him to do so.

[28] I see no reason to question the General Division's assessment on this issue, where it cited the correct legal test for incapacity and took into account relevant evidence. While the Applicant may not agree with the outcome, I see nothing to suggest that the General Division's findings were erroneous, much less "perverse or capricious" or "made without regard for the material."

CONCLUSION

[29] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. I found that the Applicant likely had a reasonable explanation for the delay and was unable to infer a continuing intention to pursue an appeal. I also thought it unlikely that the Minister's interests would be prejudiced by extending time, but I could not find an arguable case for any of the Applicant's reasons for appealing. It was this last factor that was decisive; I see no point in advancing an application that ultimately cannot succeed.

[30] In consideration of the *Gattellaro* factors and in the interests of justice, I am refusing this request to extend the time to appeal.

Member, Appeal Division

REPRESENTATIVE:	M. H., self-represented

[8] Declaration of Incapacity completed by Dr. K. Rajakanthan, dated November 24, 2017, GD2-18.