Citation: *E. K. v. Minister of Employment and Social Development,* 2014 SSTAD 323

Appeal No. AD-13-1061

BETWEEN:

E. K.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: November 10, 2014

DECISION

[1] The Social Security Tribunal (the "Tribunal") grants leave to appeal

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal ("the Application"), issued April 09, 2013 wherein the Review Tribunal determined that a *Canada Pension Plan*, ("CPP"), disability pension was not payable to the Applicant. On the evidence presented to it, the Review Tribunal found that the Applicant had retained work capacity. Therefore the Review Tribunal concluded that as of her minimum qualifying period, ("MQP"), date of December 31, 2011, the Applicant did not have a severe and prolonged disability.

GROUND OF THE APPLICATION

[3] The Applicant submits that the Review Tribunal 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. Her main submission is that she had not consented to the hearing proceeding without the presence of a Russian interpreter and, therefore, she was prevented from presenting her case fully.

[4] The Applicant also contends that the Review Tribunal misinterpreted or misapplied the evidence in arriving at its conclusions.

ISSUE

[5] The issue which the Tribunal must decide is whether or not the appeal has a reasonable chance of success.

THE LAW

[6] The applicable statutory provisions governing the grant of Leave are ss. 56(1), 58(1), 58(2) and 58(3) of the *Department of Employment and Social Development Act, ("DESD Act*"). Ss. 56(1) provides, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" while ss. 58(3) mandates that the Appeal Division must either "grant or refuse leave to

appeal." Clearly, there is no automatic right of appeal. An Applicant must first seek and obtain leave to bring his or her appeal to the Appeal Division, which must either grant or refuse leave.

[7] Subsection 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".

ANALYSIS

[8] 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, to be successful, the Applicant must make out some arguable case[1] or show some arguable ground upon which the proposed appeal might succeed. In *St-Louis*[2], Mosley, J. stated that the test for granting a leave application is now well settled. Relying on *Calihoo,*[3] he reiterated that the test is "whether there is some arguable ground on which the appeal might succeed." He also reinforced the stricture against deciding, on a Leave Application, whether or not the appeal would succeed.

[9] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

> 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.

[10] For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Canada (A.G.) V. St. Louis*, 2011 FC 492
[3] *Calihoo v. Canada (Attorney General)*, [2000] FCJ No. 612 TD para 15.

[11] In order to grant leave to appeal, I am required to be satisfied that the appeal has a reasonable chance of success. In order to do so, I need to determine first whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and then assess the chance of success.

[12] The Applicant has raised issues of natural justice in this Application. She claims that she did not consent for the hearing to proceed in the absence of a Russian interpreter. The Tribunal file indicates that Russian is the Applicant's first language. The Tribunal file also reveals that the Applicant did request the assistance of a Russian interpreter at the hearing. At the same time the Review Tribunal stated that although requested, the Russian interpreter failed to attend the hearing. The Review Tribunal states that the hearing proceeded without the interpreter at the request of the Applicant's representative and on the representative's reassurance that an interpreter had been requested only as "backup".[4] The Applicant comes now to state that she never agreed to the hearing proceeding without the presence of the Russian interpreter.

[13] If true, the Tribunal finds that the Applicant's allegations raise questions of a breach of natural justice, necessitating that leave to appeal the Review Tribunal decision be granted.

CONCLUSION

[14] The Application is granted.

Hazelyn Ross
Member, Appeal Division

[4] Paragraph 2 of the Review Tribunal decision