

Citation: *H. M. v. Minister of Employment and Social Development*, 2015 SSTAD 353

Appeal No: AD-13-186

BETWEEN:

H. M.

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: March 17, 2015

DECISION

[1] The Social Security Tribunal (the “Tribunal”) refuses the application to extend the time for filing leave to appeal; and refuses leave to appeal.

BACKGROUND

[2] By way of an Application requesting Leave to Appeal (the “Application”), the Applicant seeks leave to appeal the decision of the Review Tribunal issued on January 14, 2013. The decision denied the Applicant payment of a disability pension under the *Canada Pension Plan*, (“CPP”).

[3] On or about May 23, 2013, the Applicant’s husband and representative filed an Application requesting Leave to Appeal (the “Application”) with the Pension Appeals Board, (the “PAB”). Pursuant to s. 260 of the *Jobs, Growth and Long-term Prosperity Act*, the PAB traversed the Application to the Social Security Tribunal for determination by its Appeal Division, (“the Tribunal”).

[4] There are, in fact, two applications before the Tribunal. The first is an application to extend the time for filing the application for leave to appeal; the other is the Application itself.

GROUND OF THE APPLICATIONS

[5] With regard to the application to extend time for filing the Application, the Applicant’s representative states that the Application is late because in an effort to feel better the Applicant was outside of Canada for about six months. As a result, she did not receive the decision.

[6] With regard to the Application, the Applicant pled that she remains unable to work because of her back pain, which is only relieved by heat treatment and hot weather.

ISSUES

[7] The Tribunal must decide the following two issues.

- a) Is this an appropriate case in which the Tribunal should extend the time for filing the Application?

- b) In the event that the Tribunal decides to grant the Application to extend the time for filing the Application; does the appeal have a reasonable chance of success?

THE LAW

Extending Time Limit

[8] Applications to extend the time limit for filing leave applications are governed by ss. 57(2) of the *Department of Employment and Social Development (DESD) Act*. The provision allows the Tribunal to extend the time for bringing an Application for Leave to Appeal while at the same time providing an upper limit of one year for bringing the application and, by analogy, for granting an extension to the time limit.

[9] The Review Tribunal issued its decision on January 14, 2013. This meant that the Applicant had until on or about April 14, 2013 to submit her request for Leave to Appeal the decision. The Tribunal did not receive the Application until about 5 weeks later on May 23, 2013. The Applicant's representative offered only the explanation that the Applicant had been out of the country and had not received the decision.

[10] Given this explanation, on August 14, 2014 the Tribunal sent a letter to the Applicant asking for further and better particulars concerning her absence from Canada. The Tribunal's communication is reproduced below.

“Further to your Application to Extend the Time for filing an Application for Leave to Appeal the decision of the Review Tribunal, in order to assist her in making a decision, the Tribunal Member would like to have your response to the following questions:

When did you leave for India?

Were you accompanied, and if so, by whom?

Was anyone living in your X home while you were away, and if so, who? If no-one was at your home in your absence, what arrangement did you make regarding the mail?”

[11] The Tribunal also asked the Applicant to provide copies of the entry and exit stamps in the passports of whomever accompanied her to India. The Tribunal asked the Applicant to

provide her response by September 25, 2014. The Tribunal sent the letter to the address on file for the Applicant.

[12] On September 26, 2014, the Tribunal received a letter from the Applicant. The letter made no mention of the Tribunal's questions. What the letter did state was that the Applicant acknowledged receiving the Tribunal's letter of June 5, 2014, which letter acknowledged receipt of the Application. The Applicant went on to state that she was awaiting the Tribunal decision on the Application; that her health condition remained unchanged and that because of her health condition she would be outside of Canada from October 23, 2014 to May 20, 2015. The Applicant invited the Tribunal to communicate with her doctor concerning her health condition.

[13] On October 28, 2014 the Tribunal received a notice of returned mail in relation to its correspondence to the Applicant of October 7, 2014. Subsequently, the Tribunal made several attempts to contact the Applicant including attempting to contact the Applicant and her representative at a different address. The Tribunal's attempts were to no avail. To date the Applicant has not responded to the Tribunal's letter of August 14, 2014.

[14] In his submission, Counsel for the Respondent contends that the Applicant has not met her onus to satisfy the Tribunal that she meets the common law test for granting an extension. Counsel for the Respondent points out that the Applicant did not respond to the Tribunal's questions, thus the Tribunal cannot satisfy itself that there is a reasonable explanation for the delay. The Tribunal concurs.

[15] The common law test by which the Tribunal can decide whether an Applicant has provided a satisfactory explanation for delay is set out in *Gattelaro*.¹ The Federal Court stated that in exercising the authority to extend the time limit for leave to appeal, a Tribunal Member must consider the following criteria:

- Whether there was a continuing intention to pursue the application or appeal;
- Whether the matter discloses an arguable case;
- There is a reasonable explanation for the delay; and
- Whether there is prejudice to the other party in allowing the extension.

¹ *Canada (Minister of Human Resources Development) v. Gattelaro*, 2005 FC 833

[16] The Tribunal asked the Applicant a number of questions with the intention of better informing the Tribunal's decision on the Application to extend time. The Applicant's failure to respond to the Tribunal means that the Tribunal lacks a rational basis for making a decision. In the Tribunal's view, given the importance of the decision to the Applicant it is reasonable to expect that she would make appropriate arrangements to receive the decision, should it arrive during her absence. The Tribunal finds that being outside of the country, alone, is a sufficient explanation for the Applicant's delay. Accordingly, the Tribunal refuses the Application to extend the time for filing the Application.

[17] Even, had the Tribunal granted the Application to extend time, the Tribunal would refuse the Application. The Tribunal's reasons are set out below.

[18] To be successful on an application for leave to appeal, an applicant must make out some arguable case² or show some arguable ground upon which the proposed appeal might succeed.

[19] 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.

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

[21] In order to grant leave to appeal, the Tribunal is required to be satisfied that the appeal has a reasonable chance of success. This process requires the Tribunal to first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and then to go on to assess the chance of success of the appeal.

² *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[22] The Tribunal is not satisfied that the appeal would have had a reasonable chance of success because the reasons that the Applicant put forward for the appeal do not disclose or relate to a ground of appeal. What the Applicant is voicing is her disagreement with the Review Tribunal decision. Other than stating that her back pain continues, and her only relief is heat and hot weather, the Applicant has not shown how the Review Tribunal failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. Nor has the Applicant demonstrated how 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.

[23] For all of the above reasons the Tribunal is not satisfied that the appeal would have had a reasonable chance of success.

CONCLUSION

[24] The Application to extend the time for filing the Application for Leave to Appeal is refused.

[25] The Application for Leave to Appeal is refused.

Hazelyn Ross

Member, Appeal Division