

[TRANSLATION]

Citation: *A. B. v. Minister of Human Resources and Skills Development*, 2015 SSTAD 445

Appeal No: AD-13-56

BETWEEN:

**A. B.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Application for Leave to Appeal**

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SOCIAL SECURITY TRIBUNAL MEMBER: Shu-Tai Cheng

DATE OF DECISION: March 31, 2015

## **DECISION**

[1] The Social Security Tribunal refuses the application for leave to appeal to the Appeal Division.

## **INTRODUCTION**

[2] On October 25, 2012, the Review Tribunal (RT) determined that the Applicant's disability was not severe prior to December 31, 2007, during the minimum qualifying period (MQP).

[3] The Applicant filed an application for leave to appeal with the Appeal Division (the Leave Application) on August 12, 2013. She was notified by letter that an appeal from the decision had to be brought no more than 90 days after the RT's decision was received.

[4] The Leave Application was filed 291 days after the issuance of the decision. That is 201 days beyond the time limit for filing an appeal.

## **ISSUES**

[5] Should an extension of the time limit for filing the Leave Application be granted?

[6] If an extension is granted, does the appeal have a reasonable chance of success?

## **THE LAW AND ANALYSIS**

### **Extension of time limit**

[7] The Tribunal must consider and weigh the criteria established by the case law. In *Canada (Minister of Human Resource Development) v. Gattellaro*, 2005 FC 883, the Federal Court established the following criteria:

- a) the appellant has shown a continuing intention to pursue the appeal;
- b) the matter discloses an arguable case;

- c) there is a reasonable explanation for the delay; and
- d) there is no prejudice to the other party in allowing the extension.

[8] The weight to be accorded to each factor laid down in *Gattellaro* will vary according to the circumstances, and in some cases, other factors will also be relevant. The overall question is whether it is in the interests of justice that the extension of time be granted: *Canada (Attorney General) Larkman*, 2012 FCA 204.

[9] The Federal Court of Appeal has held that the question whether a party to a dispute has an arguable case is akin to determining whether the party, legally, has a reasonable chance of success: *Canada (Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[10] The Applicant received the General Division's decision on October 25, 2012. The Leave Application was filed on August 12, 2013, 291 days beyond the time limit for filing a Leave Application, and 201 days after the time for appealing had expired.

[11] The Commission has not filed any submissions regarding the extension of time or the Leave Application.

[12] The Respondent submitted:

- a) that she had a continuing intention to pursue the appeal request but [Translation] "I was experiencing major depression and was unable to understand that I needed to appeal because I was under medications and was also very depressed";
- b) that the case is arguable and that she was waiting for a follow-up with a neurologist; and
- c) that extending the time limit for appealing would not prejudice the other parties.

[13] The Applicant says that she showed a continuing intention to appeal but was sick. She explained her delay and the extension will cause no prejudice to the Respondent. In

addition, there was a change in the appeal process between the date of the decision and the date the Leave Application was filed. As for a reasonable chance of success, that will be discussed below. The Tribunal is satisfied with three of the *Gattellaro* factors, and finds that it is in the interests of justice to grant the extension of the time limit for filing the Leave Application.

### **The application for leave to appeal**

[14] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* provide that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and that the Appeal Division "must either grant or refuse leave to appeal".

[15] Subsection 58(2) of the *Department of Employment and Social Development Act* provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[16] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

- (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.

[17] A decision of the RT is considered a decision of the General Division.

[18] An application for leave to appeal is a preliminary step to a hearing on the merits. It is a first and lower hurdle for the applicant to meet than that which must be met on the

hearing of an appeal on the merits. The applicant at the leave stage does not have to prove his or her arguments.

[19] Indeed, the Tribunal will grant leave to appeal if the applicant shows that any one of the above-mentioned grounds of appeal has a reasonable chance of success.

[20] To this end, the Tribunal must be able to determine, under subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact or jurisdiction, the answer to which may lead to the setting aside of the decision attacked.

[21] In her Leave Application, the Applicant notes that:

- a) that she is sick, depressive and disabled;
- b) that her lawyer refused to represent her at the hearing before the RT and her chances of success would have been better with a lawyer;
- c) that she must undergo medical tests and has an appointment with a rheumatologist; and
- d) that further tests she must undergo will prove her disability.

[22] It is not the function of a Member who is determining whether leave to appeal should be granted, to reassess and reweigh the evidence that was put before the RT. Based on my reading of the file and the RT's decision, the Applicant's arguments, which are cited at paragraph 21 a) of this decision, have already been addressed by the RT.

[23] According to the appeal file, the Applicant did not request an adjournment to find another lawyer. The RT's decision makes no reference to a desire on the Applicant's part to have a lawyer in attendance at her hearing. Moreover, the Applicant did not explain how her argument cited at paragraph 21 b) is a question of law, fact or jurisdiction, the answer to which may lead to the setting aside of the decision attacked.

[22] Since the Applicant is not raising any of the grounds of appeal in subsection 58(1) of the *Department of Employment and Social Development Act*, the appeal has no reasonable chance of success.

### **New documents**

[25] The Applicant would like to submit additional documents (see paragraph 21 c) and d) of this decision) in support of her disability benefit claim. The additional documents must pertain to the grounds of appeal. However, the Applicant has not indicated how those documents support the above-mentioned grounds of appeal. If the Applicant is asking that we consider these additional documents, reassess the evidence, and reconsider the claim in her favour, I am unable to do so at this stage, given the constraints of subsection 58(1) of the *Department of Employment and Social Development Act*. Neither a Leave Application, nor an appeal, provides an opportunity to hear the merits of a case anew.

[26] If the Applicant's intent was to submit additional medical reports in order to have the RT's decision set aside or changed, she would have had to comply with the requirements of sections 45 and 46 of the *Social Security Tribunal Regulations*, and file an application to rescind or amend the decision with the General Division. In the present case, the Appeal Division does not have jurisdiction to rescind or amend a decision on the basis of new facts, because the division that made the decision, and no one else, is empowered to do so. That would be the General Division, in the RT's place. Strict time limits and requirements must be met in order for an application to rescind or amend a decision to succeed. Subsection 66(2) of the *Department of Employment and Social Development Act* requires that an application to rescind or amend a decision be made within one year after the day on which a decision is communicated to the parties. The RT decision is dated March 15, 2013. Consequently, the Applicant had one year after that decision was communicated, to apply to have the RT decision rescinded or amended. That period expired quite some time ago.

[27] Paragraph 66(1)(b) of the *Department of Employment and Social Development Act* requires an applicant to show that the new fact is a material one, and

that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[28] In any event, it seems to me that the documents the Applicant proposes to tender would probably not constitute new facts under section 66 of the *Department of Employment and Social Development Act*. The Applicant's MPQ ended on December 31, 2007. However, the medical reports that she wishes to submit pertain to tests and appointments that took place between November 2013 and February 2015. In addition, these tests and appointments were about the Applicant's condition from 2013 to 2015, not on or before December 31, 2007, the last date on which she could qualify for a disability pension.

[29] An appeal is not a new hearing on the merits of the Applicant's claim for a disability pension. To sum up, there are no grounds on which I can consider the additional medical documents for the purposes of an application for leave to appeal.

## **CONCLUSION**

[30] The application for leave to appeal is refused.

*Shu-Tai Cheng*

Member, Appeal Division