Citation: *H. J. v. Minister of Employment and Social Development*, 2015 SSTAD 870

Appeal No. AD-15-347

BETWEEN:

H. J.

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: July 13, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

INTRODUCTION

[2] On May 12, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued a decision in which it declined to extend the time to appeal the Respondent's decision denying the Applicant a *Canada Pension Plan,* (CPP), disability pension. The General Division described the delay in the following terms:

> [7] The Tribunal finds that the appeal was filed after the 90-day limit. The Respondent's reconsideration decision was dated July 18, 2013. The Appellant reported that he received the letter on July 25, 2013. The 90 day limit would have expired on October 23, 2013. The Notice of Appeal (NoA) is recorded as being received by the Tribunal on June 4, 2014. The Appellant claims that a NoA was submitted in March 2014. In either case this would have been after the 90 day limit.

[3] The Applicant seeks leave to appeal this decision.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success. The Federal Court of Appeal has equated a reasonable chance of success to an arguable case. *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

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[1] Sections 56 to 59 of the *Department of Employment and Social Development Act*, (DESD Act). Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[6] The Grounds of Appeal are set out in section 58 of the DESD Act.[2] These are the only grounds on which an Applicant may appeal a decision of the General Division.

SUBMISSIONS

[7] Counsel for the Applicant submitted that the General Division reached its decision in error, having relied on an erroneous finding of fact. Counsel submitted that his offices only became aware of the new legislation in January 2014, the Applicant has always had a continuing intention to pursue the appeal. In the Application, Counsel states that this continuing intention was evidenced by a letter that was sent to the Tribunal on July 25, 2013, which letter was not considered or mentioned by the General Division. Counsel's submissions on the point is reproduced below:

> Our offices were unaware of the changes to the appeal process (effective April, 2013) until January, 2014; however, our intention to appeal the July 18th, 2013 decision was well documented in our letter of July 25, 2013. Our offices did not receive a letter from SST indicating that the letter was not in accordance with the new appeal process until x date.
>
> Furthermore, the departure of the assigned counsel, Phillip Paglino between July, 2013 and January, 2014 caused a brief impediment in representation at what was a crucial point in learning about the changes to the appeal process in April, 2013. It would severely prejudice our client if his appeal is not allowed (and which was requested in our letter of July 25, 2013) as he continues to suffer a severe and prolonged disability. The Applicant filed for appeal within the requisite 90 day period after the decision of July 18, 2013 by way of letter of July 25, 2013 (which was just 3 months after the new appeal process was implemented, which our offices were unaware of until January, 2014). The Applicant should not be penalized because of the changes to the appeal process as he followed the old procedure and his appeal was filed within the proper time.
>
> The history of our intention to appeal the decision to deny Mr. H. J. CPP disability benefits is very clear and well documented. Mr. H. J. continues to suffer severe and prolonged disability rendering him unable to return to any form

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[2] **58(1) Grounds of Appeal** –

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
a. 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.

of gainful employment. The decision fails to reference our letter of July 25, 2013 which demonstrated the clear intention to appeal.

ANALYSIS

[8] The first question in this application for leave to appeal is whether the General Division applied the proper criteria when it assessed the Applicant's application to extend the time to appeal. The General Division is empowered to extend the time for bringing an appeal by section 52(a) of the DESD Act. The Act does not set out criteria by which extensions are to be granted; the decision is, therefore, within the discretion of the General Division. Case law has established certain criteria against which such applications are to be assessed. The leading case is *Gattellaro.*[3] In *Gatellaro,* the Federal Court identified the following criteria, (commonly designated the Gatellaro factors),

a) the Appellant has demonstrated 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.

[9] The Federal Court made it clear that how the *Gattellaro* factors are weighed depends on the individual case. Further, it is not an all or nothing situation as in some instances different factors will be relevant with the interests of natural justice being the overriding consideration.[4]

[10] Counsel for the Applicant took the position that the application to extend time to appeal should be granted because of circumstances outside of the Applicant's control. These circumstances include a change of counsel, though not of law firm; unfamiliarity with the new appeal procedure; as well as the General Division's failure to address the letter of July 25, 2013.

[11] The Applicant's explanation for the delay consisted of the statements "Change of Legal Representative. Unfamiliar with new procedure – Notice of appeal." Thus, perhaps not surprisingly, the General Division found the explanation wanting in that, the question of an arguable case was not addressed. Similarly, the Applicant did not address the question of

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

prejudice to the other party. As well, the General Division found that the Applicant having been represented by the same law firm throughout the proceeding, the explanation of change of Counsel was not adequate. Lastly, the General Division was not satisfied that the Applicant had demonstrated a continuing intention to pursue the appeal.

[12] It is this latter finding that has proved the most contentious. When asked, Counsel for the Applicant provided an Affidavit stating that the letter of July 25, 2013 was sent to the Tribunal by ordinary mail, and that it was not returned. The Tribunal record does not contain this letter. Nonetheless, even absent this letter, for the following reasons the Tribunal is not persuaded that an arguable case has been made out.

[13] The full text of the letter states:

> Please be advised that we act for Mr. H. J. with regard to his CPP Disability claim. We are in receipt of correspondence dated July 18th 2013 denying our request that the decision to deny H. J. Disability benefits be reconsidered. This correspondence serves as formal notice of Mr. H. J.'s intention to dispute this decision.

[14] The Tribunal agrees that the letter certainly evidences an intention to pursue the appeal, however, even accepting that the letter of July 25, 2013 was sent to the Tribunal, but somehow not placed before the General Division, the Tribunal finds that it would likely have had little impact on the decision. The letter does little to explain the more than one year delay between the time it was written and the subsequent attempt to file the Notice of Appeal. Nor does the letter explain why, when filed, the Notice of Appeal was missing required information.

[15] Furthermore, the Tribunal does not accept the explanation of a change of Counsel. At all material times the Applicant was represented by the same reputable law firm, thus the change in individual lawyer is immaterial. The Applicant remained a client of the firm throughout. Neither does the Tribunal accept the explanation that the Applicant's law firm was not aware of the legislative changes that came into force effective April 1, 2013. These changes were hardly secret and the explanation is not what a reasonable person would expect of legal practitioners. The Tribunal is of the view that it is reasonable to assume that Counsel representing clients in CPP matters are competent in the relevant law. Thus the Tribunal rejects "ignorance of the law' as a satisfactory explanation.

[16] With regard to the decision not to extend the time for filing the appeal, the Tribunal finds the General Division did not err in either its application of the case law or its assessment of the appropriateness of granting the application to extend the time for bringing the appeal. The Tribunal is not satisfied that an arguable case has been raised.

CONCLUSION

[17] Counsel for the Applicant submitted that the General Division erred in its apprehension of the facts; and that at all times the Applicant had a continuing intention to pursue the appeal. On the basis of the analysis above the Tribunal is not satisfied that the Applicant has raised an arguable case.

[18] The Application for leave to appeal is refused.

Hazelyn Ross
Member, Appeal Division