Citation: *G. D. v. Minister of Employment and Social Development*, 2015 SSTAD 887

Appeal No. AD-15-359

BETWEEN:

G. D.

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: Janet LEW

DATE OF DECISION: July 16, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 15, 2015. The General Division refused to exercise its discretion in favour of extending the time for the Applicant to file a notice of appeal, as it found that he had failed to provide a reasonable explanation for the delay in filing the notice of appeal in a timely manner, and that he did not exhibit a continuing intention to pursue an appeal. The Applicant filed an incomplete application requesting leave to appeal with the Social Security Tribunal on June 15, 2015 and a complete application on June 24, 2015. To succeed on this leave application, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

HISTORY OF PROCEEDINGS

[3] The Applicant applied for a Canada *Pension Plan* disability pension. The Respondent denied the application initially and subsequently on reconsideration, the latter by letter dated September 16, 2013.

[4] The Applicant appealed the reconsideration decision by filing a Notice of Appeal on January 17, 2014. He did not disclose when he might have received the reconsideration decision, however explained that he had been late in appealing within the 90 days because he "misplaced the forms".

[5] The Social Security Tribunal contacted the Applicant by telephone on March 4, 2014, advising him that he had yet to provide a copy of the reconsideration decision. The Social Security Tribunal advised the Applicant to request a copy of the reconsideration decision from Service Canada and to provide the Social Security Tribunal with a copy once he received it.

[6] The Applicant provided a copy of the reconsideration decision (along with the hearing file) on or about March 24, 2014. On March 25, 2014, the Applicant contacted the

Social Security Tribunal to enquire as to whether it had received the reconsideration decision from him. The Social Security Tribunal contacted the Applicant on March 26, 2014 and confirmed that it had received the reconsideration decision and now considered the appeal complete. The notes on file indicate that the "next steps and appeal process" were verbally explained to the Applicant.

[7] On April 15, 2014, the Social Security Tribunal wrote to the Applicant as follows:

> This letter is to confirm that the General Division of the Social Security Tribunal of Canada has received your Notice of Appeal. It appears to have been filed more than 90 days after the date that you received your Employment and Social Development Canada reconsideration decision.
>
> The Tribunal has the authority to extend the appeal period under certain circumstances, but in no case can an extension be granted if more than one year has passed since you received the reconsideration decision. A Member of the General Division of the Tribunal will review the file to determine whether or not an extension of time should be allowed.

[8] The Social Security Tribunal did not indicate in its letter dated April 15, 2014 when it considered the Notice of Appeal to have been received. The Social Security Tribunal also did not indicate how it determined that the Notice of Appeal appeared to have been filed more than 90 days after the Applicant had received the reconsideration decision.

[9] Typically, when appeals appear to have been filed late, the Social Security Tribunal requests applicants address the following factors:

(a) Whether there was a continued intention to pursue the appeal;
(b) Whether the matter discloses an arguable case;
(c) Whether there was a reasonable explanation for the delay; and
(d) Whether there would be prejudice to the other parties in extending the deadline.

[10] The Social Security Tribunal did not document any requests that the Applicant address these four factors, but the Applicant nonetheless wrote to the Social Security Tribunal on April 23, 2014. He acknowledged that his Notice of Appeal was late, and explained that he must have misplaced the papers.

[11] On August 7, 2014, the Respondent filed submissions. They did not address the issue of the lateness of the filing of the Notice of Appeal.

[12] On December 5, 2015, the Member of Parliament for Hamilton Mountain contacted the Social Security Tribunal on behalf of the Applicant, seeking a status update. The enquiry included a letter from the Applicant in which he sought to "challenge the Oath breakers", although it is unclear what the Applicant meant by this.

[13] The General Division rendered its decision on March 15, 2015. The Applicant had acknowledged in his letter of April 23, 2014 that he was late in filing the Notice of Appeal, but at no time indicated when he might have received the reconsideration decision. Notwithstanding the fact that there are no statutory deeming provisions applicable to the receipt of reconsideration decisions, the General Division nonetheless proceeded to determine when the Applicant was likely to have received the reconsideration decision by *de facto* applying paragraph 19(1)(a) of the *Social Security Tribunal Regulations*. The General Division assumed a reasonable mailing time of 10 days from the date of the reconsideration decision and deemed the Applicant had to have received it therefore on September 26, 2013. The General Division calculated that the 90-day limit set out in paragraph 52(1)(b) of the *Department of Employment and Social Development Act* (DESDA) therefore was December 25, 2013.

[14] The General Division also found that the Applicant could only have filed an appeal after he had fully perfected the Notice of Appeal on March 24, 2014. This was more than 90 days after December 25, 2013.

[15] The General Division considered the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, in assessing whether to extend the time for filing of the Notice of Appeal. The General Division wrote:

> [17] The Appellant has an arguable case, and there is no evidence that the Respondent would be prejudiced by a late appeal. However, those two tests have relatively low bars that can be reached easily by many applicants who have not filed an appeal in time. The larger consideration here is the failure of the Appellant to display a continuing intention to appeal, and to provide a reasonable explanation for his delay in doing so. The Appellant has not provided the Tribunal with a

> compelling reason as to why he was unable to meet the time limit that is set out clearly in the CPP and in correspondence received by him.

[16] The General Division denied an extension of time to the Applicant for filing his Notice of Appeal.

SUBMISSIONS

[17] The Applicant submits that he was late in filing the Notice of Appeal as his family did not help him complete the application form. The Applicant's reasons for appeal and leave to appeal are somewhat incoherent. He wrote the following:

> They say the Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God. . .
>
> Because of the way they took care of property and cause damage.

[18] The Respondent did not file any written submissions.

THE LAW

[19] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[20] Subsection 58(1) of the DESDA sets out 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.

[21] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

ANALYSIS

[22] The Applicant has not raised any grounds which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA. He does not allege that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, nor does he allege that the General Division erred in law or 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. There should be at least one reviewable error made by the General Division that gives the appeal a reasonable chance of success.

[23] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some particulars of the error or failing committed by the General Division which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA. The application is deficient in this regard and I am not satisfied that the appeal has a reasonable chance of success.

[24] While the Applicant has not raised appropriate grounds of appeal, subsection 58(1) of the DESDA nonetheless enables the Appeal Division to determine if there is an error of law, whether or not the error appears on the face of the record.

[25] In this case, the General Division determined that the Applicant had been late in filing his Notice of Appeal. The General Division also determined that the Notice of Appeal had to have been perfected (by filing a copy of the reconsideration decision), before it could be considered to have been filed. The General Division assessed whether there was a basis upon which it could exercise its discretion and extend the time for filing the Notice of Appeal. It considered and weighed the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, though stated that the overriding

consideration is that the interests of justice be served. While the General Division found that there was an arguable case and that an extension would not cause undue prejudice to any of the parties, the General Division held that in this case the "larger consideration" was what it perceived as the Applicant's failure to display a continuing intention to appeal, and his failure to provide a reasonable explanation for the delay in filing the Notice of Appeal. The General Division found that the Applicant had failed to provide a compelling reason why he was unable to meet the time limit set out in the *Canada Pension Plan* and "in correspondence received by him".

[26] It appears that the General Division may have based its decision on an erroneous finding of fact, when it suggested that the Social Security Tribunal had written to the Applicant and clearly stated that he was required to provide compelling reasons why he was unable to meet the time limit. While it seems certain that the Social Security Tribunal provided the Applicant with this advice verbally, as evidenced by the notes of a telephone conference with the Social Security Tribunal on March 4, 2014, and by the fact that the Applicant provided an explanation on April 23, 2014, there is no documentation from the Social Security Tribunal to the Applicant of which I am aware, requiring him to address each of the four factors listed above in paragraph 9, or what the consequences might be if he failed to do so.

[27] Also, the General Division inferred -- probably correctly -- that the "misplaced papers" which the Applicant referred to in his explanation was necessarily the Notice to Appeal form. From this, the General Division concluded that there was no continuing intention or any reasonable explanation, as the Applicant could have readily obtained these forms on the website of the Social Security Tribunal and then filed the Notice of Application on time. From what I can determine, there was no evidence before the General Division as to when the Applicant might have misplaced the forms and when he might have taken steps to replace them, if any, or if he simply relocated them. There is no evidence also as the Applicant's ability to have readily replaced the forms. There is some suggestion from him that he might have been reliant on others to assist him in completing the forms (e.g. AD1A), but it is unknown whether this might have been a consideration at all. These were legitimate considerations which could have been addressed by the Applicant and which could have

strongly impacted the issues as to whether there was a reasonable explanation for the delay and a continuing intention.

[28] Finally, although the General Division cited *Larkman*, it is not altogether apparent whether the General Division followed it. Not only did the Federal Court of Appeal hold that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour. At paragraphs 61 and 62, the Federal Court of Appeal wrote,

> [61] The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:
>
> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?
>
> See *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.); *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249 (CanLII) at paragraph 8.
>
> [62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, *supra* at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 (CanLII) at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195 (CanLII), 89 Admin LR (4th) 1.

[29] Given the considerations above, namely, (1) whether it was appropriate to *de facto* apply the deeming provisions of paragraph 19(1)(a) of the *Regulations* and (2) whether it

was appropriate to determine that the Applicant had not brought his application until March 24, 2014, I am overall satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[30] The Application is granted.

[31] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division