Citation: ***B. B. v. Minister of Employment and Social Development,*** **2015 SSTAD 1018**

Date: August 26, 2015

File number: AD-15-262

APPEAL DIVISION

Between:

B. B.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Decided on the record on August 26, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* disability pension. The Respondent denied the application initially and after reconsideration. The Appellant appealed to the General Division of the Social Security Tribunal of Canada approximately eight months after the time to do so had expired and requested an extension of time to do so. On February 12, 2015 the General Division decided that the Appellant had an arguable case and that there would be no prejudice to any party if the matter proceeded. It denied the Appellant's request on the basis that the Appellant did not have a reasonable explanation for the delay in filing the appeal and that he did not have a continuing intention to appeal. The Appellant requested leave to appeal this decision to the Appeal Division of the Tribunal. This was granted on July 16, 2015.

[2] On appeal the Appellant argued that the General Division decision should be set aside because he had a continuing intention to pursue the appeal, but the appeal was not filed due to the negligence of his representative. This also explained his delay in appealing. In contrast, the Respondent argued that the General Division decision was correct, that there was insufficient evidence to conclude that the Appellant's representative was solely responsible for the delay in filing the appeal, and it was not clear that the Appellant had instructed the representative to file the appeal application.

[3] The *Department of Employment and Social Development Act* governs the operation of the Tribunal. Section 59 of the Act states that the appeal division may dismiss the appeal, give the decision that the General Division should have, refer the matter back to the General Division for reconsideration or confirm, rescind or vary the decision of the General Division (see Appendix).

[4] This appeal was decided based on the written record after considering the following:

a) The complexity of the issue under appeal;

b) The fact that the credibility of the parties was not a prevailing issue;

c) The fact that the appellant or other parties were represented;

d) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit; and

e) The parties' agreement that it was appropriate to proceed in this fashion.

STANDARD OF REVIEW

[5] I must decide if the General Division decision that denied an extension of time to file the application for leave to appeal should stand. The first step in doing this is to decide what standard of review is to be applied to the General Division decision. The Appellant made no submissions on this issue. The Respondent argued that the standard of review to be applied in this case is that of correctness. The leading case on this is *Dunsmuir v. New Brunswick,* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal's own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law. Issues of natural justice, jurisdiction and issues of law that are of central importance to the legal system as a whole are reviewed on a standard of correctness. When a correctness standard of review is applied, the reviewing Tribunal completes its own analysis of the issue and decides whether it agrees with the prior decision maker. If not, it substitutes its own decision for the one reviewed. This was accepted by the Federal Court of Appeal in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, which involved a *Canada Pension Plan* disability claim.

[6] In this case, the issue to be decided is a question natural justice, that is, whether the Appellant was deprived of a fair hearing as his request to an extension of time was refused. The standard of review to be applied to the General Division decision is correctness.

ANALYSIS

The Law

[7] Section 57 of the *Department of Employment and Social Development Act* provides that an appeal from a decision made by the Income Security Section of the Tribunal must be made within 90 days of the decision being communicated to the claimant. It also provides that this

time may be extended, but in no case may an application be made more than one year after the day on which the decision is communicated to the claimant.

[8] In *Canada (Minister of Human Resources Development) v. Gatellaro*, 2005 FC 883 the Federal Court concluded that the following factors should be considered and weighed when deciding this issue:

a) A continuing intention to pursue the application;

b) There is a reasonable explanation for the delay;

c) There is no prejudice to the other party in allowing the extension; and

d) The matter discloses an arguable case.

[9] The General Division listed these factors. It concluded that the Appellant did not have a continuing intention to pursue the appeal, or a reasonable explanation for his delay in doing so. It also concluded that the Appellant had an arguable case, and that there would be no prejudice if the appeal proceeded.

Submissions

[10] In his submissions on appeal, the Appellant argued that he had a continuing intention to appeal and a reasonable explanation for the delay. He asserted that had trouble communicating with his union representative. Despite this, he instructed his representative to proceed with the appeal in a timely fashion. The representative did not do so. When the union learned of this, it fired him. The Appellant filed a copy of the representative's letter of termination to support this argument. He argued that he should not be held responsible for the conduct of his representative. The Appellant also argued that he had health and language issues which made it more difficult to prosecute his case in a timely way.

[11] In addition, the Appellant contended that he tried to obtain further medical information to support his claim during the time permitted for the appeal to be filed. This may have been especially important as the Appellant had just been diagnosed with leukemia, and this diagnosis may have impacted the outcome of the disability claim.

[12] The Respondent argued that the documents provided by the Appellant did not state specifically that the representative was fired because of he did not file the appeal in a timely way, and that the letter that purported to instruct the representative to file an appeal did not do so clearly.

[13] The reconsideration decision in this matter was dated September 20, 2012. From the material before me, I am satisfied that the Appellant discussed this with his. The discussion was followed with the letter from the Appellant to his representative on December 10, 2012. This letter states:

> As discussed today, attached you will find the latest letter regarding [the Appellant's] CPP Disability application. Please let me know if you require further information.

[14] Although the letter of December 2012 does not specifically instruct the representative to file an appeal, it makes reference to a telephone discussion on this topic. When this letter is examined in context with the new diagnosis, the Appellant's attempt to acquire further medical evidence, and the facts regarding the representative's conduct, I am satisfied that the Appellant instructed the representative to pursue the appeal, which he did not do.

[15] I am not persuaded by the Respondent's argument that the reason for the Appellant's representative's termination is not clear. It is common for a letter of termination to not set out specifically the cause for termination. The employer wrote that the representative was terminated because of he did not follow the Appellant's instructions to proceed with the appeal. There is no information before me that suggests that this was not the case.

[16] The Respondent also relied on the Federal Court decision in *Washagamis First Nation of Keewatin v. Ledoux*, 2006 FC 1300 to support its position that even if the Appellant instructed his former representative to file the appeal within the time permitted to do so, this did not demonstrate that he had a continuing intention to appeal and an explanation for his delay in so doing. *Washagamis* concerned a number of wrongful dismissal claims against one employer. The employer delayed the resolution of the claims by not instructing and changing counsel. The Adjudicator ultimately made a decision in the matter in the absence of the employer after lengthy delays and unsuccessful attempts to contact counsel. The employer then requested an

extension of time to appeal this decision. This was denied. The decision sets out the principles that may be applied to a request for an extension of time to file an appeal.

[17] The *Washagamis* decision stated that a party is not to be excused where he sits idly by on the sidelines of the litigation and fails to hold his representative accountable. The claimant must make necessary inquiries of counsel and find out why the deadline was missed, and offer clear and convincing evidence to substantiate his own lack of responsibility. The Respondent suggested that the Appellant in this case had not done this. With respect, I am not persuaded that the Appellant in this case sat idly by on the sidelines. The employer in *Washagamis* delayed the litigation by approximately two years by not responding to correspondence and telephone calls, retaining different counsel and not appearing at the hearing. The Appellant in this case provided the information he had received from the Respondent, discussed the matter with his representative and asked to be contacted if anything further was required. He wrote that he had difficulty communicating with the representative. He must have contacted the representative or the union, however, or the request for an extension of time would not have been filed with the Tribunal.

[18] *Washagamis* is also distinguished from the case before me as in that case the employer participated in a strategy of delay and the court found that any extension of time would cause prejudice to the other party. In contrast, in the matter at hand, the Appellant did not participate in delaying tactics. The General Division also found that there was no prejudice to the Respondent. Finally, the case before me was not one where a party was indifferent to the filing requirements, but one where the appeal was filed late because of mistake or negligence by the Appellant's representative.

[19] For these reasons, I am satisfied that the Appellant should not be held responsible for the actions of his representative.

The General Division Decision

[20] The courts have consistently decided that the weight to be given to each of the factors considered in deciding whether to extend the time to file an appeal may differ in each case, and

in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served (see *Canada (Attorney General) v. Larkman*, 2012 FCA 204).

[21] After reviewing the General Division decision and the parties' submissions for leave to appeal and on appeal, I am persuaded that the General Division decision to refuse an extension of time was incorrect. The General Division reasons for decision applied the four factors in the *Gatellaro* decision to the facts. It did so mechanically and did not explain why little, if any, weight was given to the fact that the Appellant had presented an arguable case. The case law is also clear (see *Larkman*; *Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263) that the overriding consideration is to do justice to the parties. The General Division did not consider this in reaching its decision in this matter. This was an error of law, which led to an unreasonable and incorrect decision. The Appellant did not have a fair hearing on the merits of his claim which in this case was a breach of the principles of natural justice.

REMEDY

[22] The appeal must be allowed. Section 59 of the *Department of Employment and Social Development Act* authorizes the Appeal Division of the Tribunal to give the decision that the General Division should have given. In this case, I am satisfied that the General Division should have extended the time for the filing of this appeal. The Appellant had an arguable case. He had a continuing intention to pursue the appeal, and a reasonable explanation for the delay in doing so. There would be no prejudice to the Respondent if the matter was heard on its merits. This matter is referred to the General Division for a hearing on the merits of the disability claim. To avoid any potential apprehension of bias this matter should be heard by a different Member of the General Division.

[23] This matter was expedited at the Appeal Division because the Appellant has been diagnosed with a terminal illness. The parties worked cooperatively to expedite the matter at the Appeal Division. They are commended for this. This matter should similarly be expedited by the General Division.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

57. (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,

(a) in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant; and

(b) in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.

(2) The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

58. (1) 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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

59. (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.