Citation: *R. G. v. Minister of Employment and Social Development*, 2015 SSTAD 1261

Appeal No. AD-15-948

BETWEEN:

R. G.

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: October 27, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 27, 2015. The General Division found that the Applicant had been late in filing a Notice of Appeal from the reconsideration decision of the Respondent. The General Division refused to exercise its discretion in favour of extending the time for the Applicant to file a Notice of Appeal beyond the 90-day limit set out in paragraph 52(1)(b) of the *Department of Employment and Social Development Act* (DESDA), as it found that the Applicant did not have an arguable case as she did not have sufficient contributions to the *Canada Pension Plan*. The Applicant filed an application requesting leave to appeal with the Social Security Tribunal on August 28, 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 reconsideration decision was sent to the Applicant by letter dated February 27, 2014. The Applicant filed a Notice of Appeal of the reconsideration decision on June 9, 2014.

[4] The General Division rendered its decision on July 27, 2015. The Applicant advised that she received the reconsideration letter on February 20, 2014. The General Division recognized that the Applicant could not have received the reconsideration decision before it had been issued.

[5] 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 March 9, 2014. The General Division also calculated that the Applicant had until June 6, 2014 to file an appeal under paragraph 52(1)(b) of the DESDA. Hence, she was three days late in filing an appeal.

[6] 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 found that although the Applicant had shown a continuing intention to pursue the appeal of the reconsideration decision, that she had a reasonable explanation for the delay, and that there was no prejudice to the Respondent if an extension were granted, the Applicant did not have an arguable case. The General Division found that this factor overwhelmingly weighed against allowing an extension of time.

SUBMISSIONS

[7] The Applicant submits that she had decided to remain at home and raise her six children. She states that she "did not pay into [the Canada Pension Plan] and … did not know that [she] could have paid into it separately". She notes that she is unable to drive and is very limited in her abilities. Her husband retired to care for her, as he would have otherwise continued working. She advises that she is currently awaiting back surgery and finds that she is very handicapped generally and requires help with her everyday needs.

[8] In her letter dated September 13, 2015, to the Social Security Tribunal, the Applicant advised that her general health is extremely poor and that she is also suffering from Crohn's disease, which requires full-time monitoring. She described her back pain as unbearable.

[9] The Applicant did not allege any error on the part of the General Division.

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

THE LAW

[11] 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.

[12] 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[13] I need to be satisfied that any 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

[14] The Federal Court of Appeal has held that an improper exercise of discretion occurs when a decision-maker gives insufficient weight to relevant factors, proceeds on a wrong principle of law, erroneously misapprehends the facts, or where an obvious injustice would result: *Oyenuga v. Attorney General (Canada)*, 2013 FCA 230.

[15] The Applicant does not allege that the General Division improperly exercised its discretion but I understand her submissions effectively to mean that an obvious injustice would result, given her medical state. Otherwise, she has not raised any grounds which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA. She

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 she 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. Under subsection 58(1) of the DESDA, there should be at least one reviewable error made by the General Division that gives the appeal a reasonable chance of success.

[16] 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.

[17] The General Division determined that the Applicant had been late in filing her Notice of Appeal. 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. The General Division determined that the Applicant did not have an arguable case in declining to exercise its discretion and grant an extension. However, the General Division made no reference to *Canada (Attorney General) v. Larkman*, 2012 FCA 204, where the Federal Court of Appeal held that while a consideration of the factors are relevant to the exercise of discretion to allow an extension of time, the "overriding consideration is that the interests of justice be served". It is not altogether apparent that the General Division considered the overall interests of justice in determining whether to exercise its discretion.

[18] Despite this, even if the General Division had granted an extension of time for filing a Notice of Appeal, I cannot see any basis upon which the appeal of the reconsideration decision would have been allowed. A disability pension is payable only if four conditions are met:

i. the applicant has not reached 65 years of age;

ii. no retirement pension is payable to that applicant;

iii. the applicant is disabled; and

iv. the applicant has made contributions for not less than the minimum qualifying period, i.e. the applicant has made sufficient valid contributions to the *Canada Pension Plan*.

[19] The Applicant has not met all four conditions, as she clearly has not met the fourth condition.

[20] The Federal Court of Appeal in *Miceli-Riggins v. Attorney General of Canada*, 2013 FCA 158 examined the objectives of the *Canada Pension Plan.* The Court of Appeal stated:

> [69] . . . The *Plan* is not supposed to meet everyone's needs. Instead, it is a contributory plan that provides partial earnings- replacement in certain technically-defined circumstances. It is designed to be supplemented by private pension plans, private savings, or both. See *Granovsky v. Canada (Minister of Employment and Immigration*), 2000 SCC 28 (CanLII), 2000 SCC 28 at paragraph 9, 2000 SCC 28 (CanLII), [2000] 1 S.C.R. 703.
>
> [70] Indeed, it cannot even be said that the *Plan* is intended to bestow benefits upon demographic groups of one sort or another. Instead, it is best regarded as a contributory-based compulsory insurance and pension scheme designed to provide some assistance – far from complete assistance – to those who satisfy the technical qualification criteria.
>
> [71] Like an insurance scheme, **benefits are payable on the basis of highly technical qualification criteria**.
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> . . .
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> [74] In the words of the Supreme Court,
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> > The *Plan* was designed to provide social insurance for Canadians who experience a loss of earnings due to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which **Parliament has defined both the benefits and the terms of entitlement**, including the level and duration of an applicant's financial contribution.
> >
> > (*Granovsky*, *supra* at paragraph 9.)
> >
> > (my emphasis)

[21] The *Canada Pension Plan* operates like an insurance scheme, where entitlement is dependent on contributions. A disability pension is not available to everyone who suffers from a disability. It is not enough to prove a disability. It is clear that an applicant must meet other requirements in order to qualify for a disability pension under the *Canada Pension Plan*.

[22] I am not satisfied that the appeal has a reasonable chance of success, and as such, I refuse both the application for an extension of time for filing and the application for leave to appeal.

CONCLUSION

[23] The applications for an extension of time for filing and for leave to appeal are dismissed.

Janet Lew
Member, Appeal Division