

**Citation: *A. P. v. Minister of Employment and Social Development*, 2015 SSTAD 1404**

**Date: December 8, 2015**

**File number: AD-15-1121**

**APPEAL DIVISION**

**Between:**

**A. P.**

**Applicant**

**and**

**Minister of Employment and Social Development**

**Respondent**

**Leave to Appeal**

**Decision by: Hazelyn Ross, Member, Appeal Division**

## **DECISION**

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), is granted.

## **INTRODUCTION**

[2] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension. The Respondent denied her application both initially and upon reconsideration. The reconsideration decision was issued on October 24, 2013. On April 29, 2014, the Applicant filed a notice of appeal with the Tribunal. However, the notice of appeal was both incomplete as well as filed outside of the 90-day time limit for filing. The Applicant's only explanation for the late filing was that she had "misfiled her papers". The Tribunal gave the Applicant an opportunity to complete the application and to provide reasons for the late filing. The Tribunal asked the Applicant to provide the additional information by June 22, 2015. She had not done so at the time the decision was issued.

[3] On September 19, 2015, the General Division of the Tribunal issued a decision refusing to extend the time for filing the appeal. In its decision the General Division held that the Applicant had failed to provide a satisfactory explanation for the delay in filing and had also not demonstrated a continuing intention to pursue her appeal. The Applicant seeks leave to appeal the decision of the General Division.

## **GROUND OF THE APPLICATION**

[4] The Application is made on the basis that the General Division breached a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

[5] On the Applicant's behalf, a relative submitted that the Applicant's failure to file the appeal on time or to give any fuller explanation for that failure was the result of her mental health and medical condition. The representative submitted that the Applicant has always maintained a continuing intention to pursue her appeal.

## ISSUE

[6] The Appeal Division must decide if the appeal has a reasonable chance of success.

## APPLICABLE LAW

[7] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.<sup>1</sup> To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success<sup>2</sup>. In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 as well as in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. In *Canada (Attorney General) v. Carroll*<sup>3</sup> the Federal Court opined that, “an Applicant will raise an arguable case if she [or he] ... raises an issue not considered ... or can point to an error” in the decision.

[8] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the *Department of Employment and Social Development Act*, (DESD Act), namely, breaches of natural justice; error of law; or error of fact.<sup>4</sup> However, to grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success. This means that the Appeal Division must first find that, were the matter to proceed to a hearing, at least one of the grounds of the Application relates to a ground of appeal and that there is a reasonable chance that the appeal would succeed on this ground.

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<sup>1</sup> Sections 56 to 59 of the 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.”

<sup>2</sup> The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

<sup>3</sup> *Canada (Attorney General) v. Carroll*, 2011FC1092 para 14.

<sup>4</sup> **58(1) Grounds of Appeal** –

The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or 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.

## ANALYSIS

[9] The Applicant submitted that the General Division decision breached natural justice. In the decision, the General Division Member conducted an examination of the circumstances within the context of *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. The Member reached the conclusion that while the Applicant had an arguable case and while there was no evidence of prejudice to the Respondent from the late appeal, her finding that the Applicant had failed to display a continuing intention to pursue the appeal or to provide a reasonable explanation for her delay in doing so were fatal to the grant of an extension of time.

[10] Although the General Division Member makes reference to the interests of justice in the final paragraph of the decision, the Appeal Division is not persuaded that the Member actually considered whether it would be in the best interest of justice to allow the extension of time. The decision contains no discussion on this point.

[11] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 the Federal Court of Appeal expanded the decision in *Gattellaro*, adding a fifth criterion to the four factors identified in *Gattellaro*. The Federal Court of Appeal stated that the test is flexible and must be geared to ensure that justice is done between the parties. In the opinion of the Federal Court of Appeal, ensuring that justice is done is the underlying consideration in an application to extend time. Thus, according to *Hogervorst*, this flexibility includes assigning an appropriate weight to each factor depending on the circumstances, the granting of leave even though one of the four standard criteria are not present and the requirement of a fifth factor, i.e. the facts of the particular case.

[12] In the later case of *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 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.

[13] Thus, the Appeal Division has considered the facts of the instant case, in addition to the four *Gattellaro* factors set out below:

- Whether the Applicant had a continuing intention to pursue the appeal;
- Whether the matter discloses an arguable case;
- Whether the Applicant has put forward a reasonable explanation for the delay; and
- Whether the Respondent would be prejudiced if the Tribunal were to extend the time for filing the appeal.

[14] The Appeal Division is not satisfied that this Application for leave to appeal had no reasonable chance of success since it appears that the General Division Member may have treated the absence of two factors as being fatal to the application for late filing rather than weighing all four factors and also considering whether it would be in the interest of justice to allow an extension of time. For this reason, the Application is granted.

## **CONCLUSION**

[15] The Application is granted.

*Hazelyn Ross*  
Member, Appeal Division