

Citation: *N. N. v. Minister of Employment and Social Development*, 2015 SSTAD 1405

Date: December 8, 2015

File number: AD-15-913

APPEAL DIVISION

Between:

N. N.

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 is granted.

INTRODUCTION

[2] On May 25, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued a decision refusing to extend the time for making an appeal to the General Division. The General Division made its decision on the basis that the Applicant had not demonstrated a continuing intention to pursue his appeal. On May 26, 2015, Counsel for the Applicant filed a request for leave to appeal to the Appeal Division, (the Application).

GROUND OF THE APPLICATION

[3] Counsel did not relate the Application to a ground of Appeal. Instead, Counsel stated that the Appeal had a reasonable chance of success because:

In the decision denying time extension to appeal, it states “failure of the Appellant to display continuing intention to appeal and a reasonable explanation for his delay to do so”.

On behalf of Mr. N. N. our office sent the appeal to SST in a letter dated June 5, 2014. We then received a letter from the SST dated July 5, 2014 requesting for more information. Our office then sent the information that was requested in a letter dated August 24, 2014. Further, our office received a letter from SST dated December 8, 2014 requesting further information. Our office wrote to SST in a letter dated January 1st 2015 attaching all the letters that was sent to SST and including the information requested.

It is clear that on behalf Mr. N. N., our office has shown the intention to continue with the appeal and also provided any information that the SST requested.

[4] The Appeal Division infers from the nature of Counsel’s submissions that the Application is based on subsection 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[5] Does the Appeal have a reasonable chance of success?

APPLICABLE LAW

[6] 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 success². 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.

[7] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the DESD Act, namely, breaches of natural justice; error of law; or error of fact.³ 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.

SUBMISSIONS

[8] The Appeal Division provided the parties with an opportunity to make submissions on whether or not leave to appeal should be granted. The Respondent took no position on the question while Counsel for the Applicant referred the Appeal division back to Counsel's letters

¹ 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."

² 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."

³ **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.

of June 5, 2014, August 21, 2014, January 15, 2015 and May 1, 2015. These letters reiterate the Applicant's position that he met the timeline for filing the Notice of Appeal.

ANALYSIS

[9] At the heart of this Application is the question of whether the General Division erred in concluding that the Applicant had failed to comply with Tribunal instructions and that that failure demonstrated the absence of a continuing intention to pursue his appeal. In this regard the Tribunal finds that it is helpful to set out the history of the proceedings before the General Division.

History

[10] On February 1, 2013, the Applicant applied for a CPP disability pension. The Respondent denied his application. The Applicant requested a reconsideration of the denial. However, the Respondent maintained the denial. The reconsideration decision is dated March, 26, 2014.

[11] On June 5, 2014, Counsel for the Applicant filed a Notice of Appeal with the Tribunal. The Notice of Appeal took the form of a letter. It was incomplete, however at the time that the Applicant's Counsel filed the incomplete Notice of Appeal, the 90-day period for filing the appeal had not yet expired. The content of the incomplete appeal is reproduced below:

Please be advised that we represent Mr. N. N. with respect to his appeal concerning entitlement to CPP Disability Benefits. Attached is an authorization signed by Mr. N. N.

We hereby appeal the reconsideration decision of the HRSDC dated May 26, 2014. In this decision, it was concluded that Ms. N. N. does have limitation but does not show that his limitations would have continuously prevented him from doing some type of work. We disagree with this conclusion.

Mr. N. N. overall condition is chronic, and consistently interferes with his activities of daily living in such a manner that he is unable to regularly pursue or maintain any type of gainful employment.

[12] On July 5, 2014, the Tribunal sent a letter to the Applicant advising that his notice of appeal is incomplete; the pertinent portions of the letter are:

Information Required to Complete your Notice of Appeal

In order for the appeal to be filed, the Tribunal must receive **in writing** the following information **without delay**:

A copy of the reconsideration decision being appealed (Note: it may be that you did not request a reconsideration decision from Service Canada, which must be done before appealing to the Tribunal);

The Appellant's address, telephone number and, if any, facsimile number and email address; and

A declaration that the information provided is true to the best of the Appellant's knowledge. The Appellant may send a declaration to the Tribunal by indicating, on a blank piece of paper:

The Appellant's full name; and

The Tribunal Number (refer to number in subject line); and

The following declaration: *"I, (full name of Appellant), declare that the information provided for appeal number (number of appeal) is true to the best of my knowledge."*

Note: Refer to the top of page 1 of this letter for Tribunal contact information.

[13] The Tribunal asked the Applicant to send in the material without delay. However the Applicant did not respond for some 6 weeks. This is where the problem begins.

[14] In its letter, the Tribunal also advised the Applicant that he must meet the 90-day time limit or else his appeal would be considered late. A separate paragraph of the Tribunal's letter to the Applicant is dedicated to this question. It appears under the rubric,

Timeframe to File your Notice of Appeal

A complete Notice of Appeal must be received within 90 days of the date that the reconsideration decision from the Department of Employment and Social Development Canada was communicated to the Appellant.

[15] Furthermore, the Tribunal's letter also advises of the possible consequences, should the Notice of Appeal be filed late.

If Notice of Appeal is filed beyond Timeframe

If you wish to proceed and do not provide the requested information within the timeframe specified above, you will be required to request, **without delay**, an extension of time to file the complete Notice of Appeal. You can request an extension of time by providing a written explanation or by completing Section 2B of the Notice of Appeal form, addressing **all** of the following:

- 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 party in extending the deadline.

[16] The Tribunal received a response from Counsel for the Applicant on August 21, 2014. The additional information that the Tribunal received included a copy of the reconsideration decision; a declaration by Counsel for the Applicant that the information that had been provided by the Applicant was true to the best of Counsel's knowledge; and a signed authorisation, naming Counsel as the Applicant's representative and including the Applicant's contact information (GD1A). The declaration did not comply with the requirements that the Tribunal stipulated in its letter to the Applicant, in that, it was not he that made it.

[17] By letter dated December 8, 2014, the Applicant was advised that the Tribunal considered the Notice of Appeal as having been filed late. The letter also directed the Applicant to request an extension of time for filing the appeal by no later than **January 7, 2015**.

[18] On January 15, 2015, Counsel for the Applicant responded to the Tribunal. She claimed that as the Applicant had responded to the request on August 21, 2014, the notice of appeal was not late (GD3). The letter stated:

We are in receipt of your letter dated December 8, 2014, stating that our appeal was late.

Our office received a reconsideration decision dated March 26, 2014, denying Mr. N. N. benefits (attached). We appealed this decision to SST In a letter dated June 5, 2014 (attached).

Further, our office received a letter from SST dated July 5, 2014, requesting more information regarding Mr. N. N.' s appeal, and a letter dated August 21, 2014 (attached) was sent responding to the SST, with the information that was requested.

Therefore, our office sent the appeal on time, and we should not have to request an extension to file the notice of appeal.

[19] On April 21, 2015, the Tribunal repeated its demand that the Applicant file an application to extend the time for filing an appeal.

[20] On **May 1, 2015**, Counsel responded insisting that the Applicant had complied with the Tribunal's time line. Counsel wrote:

The denial letter dated March 26, 2014. In your letter dated July 5, 2014 Notice of Appeal incomplete, it did not indicate our notice of appeal was late. In the denial letter it states we have 90 days to appeal. We have met the time limit.

We submitted the requested information on August 21, 2014. On December 8, 2014 we received your letter indicating our appeal was late. On January 15, 2015 we responded to your letter, kindly see attached confirmation and letters.

[21] There was no further communication between the Tribunal and the Applicant until the issuance of the General Division decision denying the extension of time. In the decision issued on May 25, 2015, the General Division Member remarked that,

[6] ...the Appellant has not provided any reasons for why the Tribunal should allow further time to appeal. His representative opines that her office sent the appeal on time and should not have to request an extension to file the notice of appeal.

Should the Appeal Division grant leave to appeal?

[22] In deciding whether or not to grant the Application to extend time, the General Division was guided by the case law on the point, in particular the decisions in *Gattellaro*.⁴ In *Gattellaro* the Federal Court set out four factors that should be considered when deciding whether to grant

⁴ *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

an extension of a time limit. These four factors were reproduced in the Tribunal's letter of July 5, 2014.

[23] It is clear that the General Division Member considered all of these circumstances in her decision. She concluded that on the facts before her, that the Applicant had an arguable case; and that the Respondent would not be prejudiced if the extension of time were to be granted. However, the General Division Member found that the Applicant had not provided a satisfactory explanation for why the Notice of Appeal was filed late. The pertinent paragraph of the decision states:

[31] ...the only indication of some intention to pursue his appeal was that his representative sent an incomplete appeal within the 90-day limit. Furthermore, the Appellant has not provided the Tribunal with any reason as to why he was unable to observe the time limit that is set out clearly in the CPP and in the correspondence received by him.

[24] Counsel for the Applicant has submitted that the General Division decision is wrong. Counsel submits that the Applicant has always had the intention to pursue the appeal. On the record before the Tribunal the entire debacle unfolded because of the position that Counsel for the Applicant chose to adopt. By her continued refusal to comply with the Tribunal's directives Counsel for the Applicant ensured that two of the *Gattellaro* factors could not be met. However, the Appeal Division is not persuaded that this was necessarily where the inquiry ought to have ended.

[25] In *Hogervorst*,⁵ the Federal Court of Appeal expanded the *Gattellaro* factors to include a fifth criterion, namely, the interests of justice.⁶ In *Larkman* 2012 FCA 204 the Federal Court of Appeal provided clear direction in respect of the "interests of justice" criterion, stating:

The test (*Gattellaro*) is flexible and must be geared to ensure that justice is done between the parties, which is the underlying consideration in an application to extend time. 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.

⁵ *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41

⁶ *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41

[26] The decision does make reference to the interests of justice; however it is not clear to the Appeal Division that the General Division took this factor into consideration as the decision contains no discussion on the best interest of justice. The Appeal Division finds that in failing to consider the best interest of justice the General Division erred. Accordingly, the Appeal Division is satisfied that the Application relates to a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[27] Leave to Appeal is granted.

Hazelyn Ross
Member, Appeal Division