Citation: *A. L. v. Minister of Employment and Social Development*, 2015 SSTAD 1430

Appeal No: AD-15-1120

BETWEEN:

A. L.

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: December 14, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 27, 2015, which it made on the record. The General Division determined that the Applicant was not eligible for a Canada Pension Plan disability pension, as it found that he had returned to gainful employment. The Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on October 15, 2015. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[3] The Applicant is seeking leave to appeal on the basis that he had been advised that he could expect an in-person hearing in front of a panel and he could bring a representative with him to the hearing. The Applicant submits that he even received a guide and video to assist in his preparation for the hearing. The Applicant submits that he was waiting for a letter advising him when the hearing would be held, when he suddenly received the decision of the General Division.

[4] The Applicant further submits that as he had been led to believe that he could expect an in-person hearing, he did not submit or file all of his pertinent information with the Social Security Tribunal. It appears that he anticipated that he would produce any additional records at the hearing. The Applicant submits that as the General Division did not have all of the relevant information, this resulted in a decision that was "done in an erroneous manner of fact, and lacking important factual information and therefore was done in a perverse or capricious manner without regard for all the material".

[5] The Respondent has not filed any written submissions.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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
>
> (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.

[7] 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. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[8] I note that 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.

[9] Essentially, the Applicant submits that the General Division failed to observe a principle of natural justice.

[10] As my colleague Pierre Lafontaine aptly described in *D.P. v. Canada Employment Insurance Commission and D.R.A. Holdings Ltd.* (November 23, 2015), currently unreported (AD-15-989), the principles of natural justice exist to ensure that everyone who falls under the jurisdiction of a judicial or quasi-judicial forum is given adequate notice to appear and is allowed every reasonable opportunity to present his case and the decision given is free of bias or the reasonable apprehension or appearance of bias.

[11] The Applicant submits that he was deprived of the opportunity to present his case. There are two issues which the Applicant raises under the umbrella of natural justice: (1) that he was not provided an in-person hearing and (2) did not have an opportunity to present all of his relevant information.

(a) In-person hearing

[12] The Applicant submits that he should have been entitled to an in-person hearing, as he had been led to believe that he could expect one.

[13] The Applicant filed his appeal with the Office of the Commissioner of Review Tribunals before April 1, 2013. Under section 257 of the *Jobs, Growth and Long-term Prosperity Act,* any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the Office of the Commissioner of Review Tribunals transferred the Applicant's appeal to the Social Security Tribunal.

[14] On May 21, 2013, the Social Security Tribunal wrote to the Applicant advising that his appeal had been transferred to the Social Security Tribunal. The letter reads:

> Under the new rules, the parties [you and Human Resources and Skills Development Canada (HRSDC)] have a maximum of 365 days to sign a Notice of Readiness and send it to the Tribunal. The Notice of Readiness lets the Tribunal know that the parties are ready to proceed with the appeal. A Notice of Readiness form is attached for your convenience.
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> Before you sign and send the Notice of Readiness form, it is very important to think about whether you have any additional information (documents and/or written submissions) you want the Tribunal to consider in making its decision. This would be information in addition to the documents on file with HRS DC. **If you have any additional information, it is important that you send it to the Tribunal when you send the Notice of Readiness form that you have signed**.
>
> The new legislation "deems" your appeal to have been filed with the Tribunal on April 1, 2013, so your 365 days end on March 31, 2014. This means that **you have until March 31, 2014 to send any additional documents to the Tribunal.** You also have until March 31, 2014 to sign and return the Notice of Readiness to the Tribunal. Please note that even if one or both parties have not sent in their Notice of Readiness by April 1, 2014, the Tribunal will proceed with your appeal.

> **It is also important to note that once the Tribunal has received the final Notice of Readiness from both parties, it will not accept any additional documents or written submissions.**

(my emphasis)

[15] There is a phone log note indicating that the Applicant contacted the Social Security Tribunal on March 27, 2014, requesting an extension of time to submit the Notice of Readiness. On April 17, 2014, the General Division granted an extension to file documentation until March 31, 2015. The letter advised both parties that if information was not provided by this timeline, the General Division Member might render a decision on the basis of the information already on file.

[16] At paragraph 13, the General Division alluded to this exchange of communications between the Applicant and the Social Security Tribunal. It noted that the Social Security Tribunal had granted the Applicant's request for an extension of time to prepare for his appeal (GT2-2). The Social Security Tribunal sent a letter dated April 17, 2014 to the Applicant, advising that the General Division had allowed an extension of time to file documentation until March 31, 2015. Despite granting an extension, the Social Security Tribunal did not receive any further information from the Applicant by the time the General Division rendered its decision on July 27, 2015.

[17] On June 13, 2014, the Social Security Tribunal notified the parties that the appeal was considered ready to proceed and that it would soon be assigning the appeal to a General Division Member. The Social Security Tribunal notified the parties to file any additional documents or written submissions that had not already been filed, without delay. The Social Security Tribunal also wrote:

> After the appeal is assigned to a Tribunal Member, the Tribunal will send another letter to advise all parties of how the Tribunal Member has decided to proceed, including final time limits for providing additional documents and responses, along with a hearing date, if applicable.

[18] On July 10, 2014, the Social Security Tribunal wrote to the Applicant advising that the letter of June 13, 2014 had been sent in error, and that he should disregard it. The

Social Security Tribunal invited the Applicant to continue to file any additional documents or written submissions that had not already been filed. The Social Security Tribunal also wrote, "When this appeal is continued ready to proceed, the Tribunal will notify all parties".

[19] In early 2015, the General Division Member requested an updated copy of the Applicant's Record of Earnings from the Respondent.

[20] On May 28, 2015, the Social Security Tribunal wrote to the Applicant, enclosing a copy of the updated Record of Earnings which it had received from the Respondent. The Social Security Tribunal also wrote:

> … A copy of the file will be provided to all parties once a Tribunal Member is assigned to this case and has decided how to proceed. All parties will be notified when the Tribunal is ready to assign this case to a Member.

[21] On May 29, 2015, the Social Security Tribunal wrote to the parties advising that the General Division Member intended to "make a **decision on the basis of the documents and submissions filed".** In addition, the Social Security Tribunal wrote:

> **FILING PERIOD**
>
> If parties have additional documents or submissions to file, they must be received by the Tribunal no later than **June 29, 2015**. A copy of any new documents received by the Tribunal will be provided to the other parties and they will be given an opportunity to respond.
>
> **RESPONSE PERIOD**
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> The Filing Period is followed by a Response Period. If a party wishes to respond to any documents filed during the Filing Period, the response must be received by the Tribunal no later than **July 28, 2015**.
>
> **DOCUMENTS FILED AFTER THE RESPONSE PERIOD**
>
> The Tribunal Member will issue a decision to either allow or dismiss the appeal after the end of the Response Period, or possibly sooner if no documents or submissions are filed during the Filing Period. Accordingly, any documents not filed within the appropriate timelines indicated will be provided to the other parties but may not be considered by the Tribunal Member in making the

decision. If documents are filed late, but before a decision is issued, they will be considered **only** at the Tribunal Member's discretion.

REASONS BY MEMBER

The Tribunal Member decided to proceed with the intention of making a **decision on the basis of the documents and submissions filed**, for the following reasons:

- There are no gaps in the information in the file or need for clarification; and,
- This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

OTHER IMPORTANT INFORMATION

While the current intention of the Tribunal Member is to make a decision on the basis of the documents and submissions filed, the Member may decide that a hearing is needed for this appeal depending on what, if any, additional information is received during the Filing and Response periods. If this is the case, all parties will then receive a Notice of Hearing with further instructions.

Following the Response Period, the Tribunal will notify all parties of the decision or, where applicable, the next steps in this appeal.

[22] After April 1, 2013, there has been no entitlement as of right to an in-person hearing before a panel. The DESDA is quite specific that hearings shall be conducted by one-person panels. Section 61 of the DESDA states that every application to the Social Security Tribunal is to be heard before a single member.

[23] Section 28 of the *Social Security Tribunal Regulations* provides the General Division with the authority to make a decision on the basis of the documents and submissions filed. Section 28 reads:

> After every party has filed a notice that they have no documents or submissions to file – or at the end of the applicable set out in section, whichever comes first – the Income Security Section must without delay
>
> a) make a decision on the basis of the documents and submissions filed; or

b) if it determines that further hearing is required, send a notice of hearing to the parties.

[24] Given the correspondence from the Social Security Tribunal, particularly the letter dated May 29, 2015, the Applicant should have by then recognized that the General Division Member intended to proceed on the record, and to make a decision "on the basis of the documents and submissions filed", rather than hold an in-person hearing.

[25] The Federal Court has determined that there is no entitlement to a *de novo* appeal arising out of any legitimate expectations that an applicant might have had under the previous statutory scheme, though this is in the context of appeals to the Appeal Division: *Belo-Alves v. Canada (Attorney General),* 2014 FC 1100. The Federal Court determined that one of my colleagues on the Appeal Division erred in considering the Applicant's application based on the claimant's legitimate expectations when she filed her appeal with the Pension Appeals Board. The Federal Court referred to *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue,* 1975 CanLII 4 (SCC), [1977] 1 S.C.R. 271 at 282, where the Supreme Court of Canada held that no one has a vested right to continuance of the law as it stood in the past. The Federal Court also held that the provisions of the *Jobs, Growth and Long-term Prosperity Act* make it clear that Parliament intended that matters dealt with by the Social Security Tribunal would be subject to the new legislation.

[26] Hence, the Applicant cannot hope to rely on any expectations that might have arisen prior to the DESDA coming into force. The General Division Member was well within her jurisdiction to make a determination on the basis of the documents and submissions filed. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Production of records

[27] The Applicant further submits that he was denied the opportunity to fully present his case, as he was unable to file all of his pertinent information. He advises that he

expected an in-person hearing and that he would have filed all of his documents at that time.

[28] The fact that the Applicant did not file any additional records or submissions was through no fault of the Social Security Tribunal or the General Division Member, for that matter. While it is unfortunate that the Applicant did not file all of his records (whatever they might be as he has not identified them), his failure to do so cannot be visited upon the Social Security Tribunal or the General Division Member.

[29] Even before the appeal was transferred to the Social Security Tribunal, the Applicant had been encouraged and advised to submit all of his documents, otherwise they might not be accepted at the hearing. Indeed, the Office of the Commissioner of Review Tribunals wrote to the Applicant on a number of occasions, advising him that if he were late in providing information, the Review Tribunal might not accept it at the hearing. These include letters dated February 7, 2012 (GT1-381), May 30, 2012 (GT1-379 to GT1-380), June 5, 2012 (GT1-377 to GT1-378) from the Office of the Commissioner of Review Tribunals to the Applicant.

[30] Letters from the Social Security Tribunal similarly advised the Applicant that he should submit any records and submissions within a certain time frame, otherwise he risked not having them considered at all by the General Division.

[31] Given that there was no entitlement to an in-person hearing, nor any reasonable expectation to one, and correspondence from both the Office of the Commissioner of Review Tribunals and the Social Security Tribunal that the Applicant should file records and submissions prior to the hearing, I am not satisfied that the appeal has a reasonable chance of success on this ground.

[32] Finally, it should be noted that the Applicant has a minimum qualifying period of December 31, 2016, which has yet to pass. The Applicant remains eligible to qualify for a Canada Pension Plan, provided that he meets the requirements under the *Canada Pension Plan.* If the Applicant intends to file a new application for a Canada Pension Plan disability pension, he would be well-advised to seek representation to assist him.

CONCLUSION

[33] The application for leave to appeal is refused.

Janet Lew

Member, Appeal Division