Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 27

Date: January 15, 2016

File number: AD-15-584

APPEAL DIVISION

Between:

J. M.

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

Heard by Teleconference on January 6, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	J. M.
Counsel for the Appellant	Avril Cardoso
Counsel for the Respondent	Christine Singh

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. The Appellant sought to appeal the reconsideration decision to the Social Security Tribunal after the time to do so had expired. She applied to the General Division of the Tribunal for an extension of time to file the appeal. The General Division refused this request on April 27, 2015.

[2] The Appellant requested leave to appeal the General Division decision to the Appeal Division of the Tribunal. On July 27, 2015 leave to appeal to the Appeal Division was granted.

[3] This appeal proceeded by Teleconference after considering the following:

a) The complexity of the issues 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;

e) videoconferencing was not available in the area where the Appellant resides; and

f) The nature and content of the submissions filed by the parties

The parties' written and oral submissions were considered in reaching the decision in this matter.

STANDARD OF REVIEW

[4] The leading case on the issue of what standard of review should be applied when reviewing a decision 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. The correctness standard of review is to be applied to questions of jurisdiction, and questions of law that are of importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

[5] In *Canada(Attorney General) v. Jean*, 2015 FCA 242 the Federal Court of Appeal stated that the Appeal Division of the Social Security Tribunal should not subject appeals before it to a standard of review analysis, but should determine whether any ground of appeal set out in section 58 of the *Department of Employment and Social Development Act* should succeed. The Respondent argued that for questions of fact or of mixed fact and law the Appeal Division should review the General Division decision on a deferential or reasonableness standard. It contended that the matter at hand concerns a question mixed law and fact.

[6] The Appellant made no submissions regarding the standard of review.

ANALYSIS

[7] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered to grant leave to appeal a decision of the General Division. Section 59 sets out the remedies that the Appeal Division can grant on an appeal (reproduced in the Appendix to this decision). I must decide if the General Division decision contained an error as set out in section 58 of the Act such that the decision cannot stand.

[8] The issue before the General Division was whether to grant an extension of time for the Appellant to file an appeal. This is a discretionary decision, and is to be given deference. The decision correctly stated that the Federal Court, in *Minister of Human Resources Development v. Gattellaro*, 2005 FC 883, set out factors that are to be considered when deciding whether to grant a claimant an extension of time to file an appeal. The General Division set out the four factors listed in this decision and applied them to the facts before it. This was not disputed.

[9] The Applicant argued that she should be granted an extension of time to file the appeal because at the time that she was to have filed the appeal documents she was also appealing a provincial disability benefit claim and was confused by the two processes, that she intended to appeal the decision, the General Division concluded that she had an arguable case on appeal, and that there would be no prejudice if the appeal continued. These statements address the factors set out in *Gattellaro*. They did not assist me to determine whether the General Division decision contained an error under section 58 of the Act.

[10] Counsel for the Appellant further contended that the *Gattellaro* decision could be distinguished from the one at hand on the facts. While in *Gattellaro* there was a period of approximately seven years between when the decision was granted and the request for an extension of time made, it was only a period of months in this case. I concur that this is a significant factual difference. I am not prepared, however, to distinguish *Gattellaro* as both parties relied on it in argument. Even if the facts are different from those before me, the legal principles set out in *Gattellaro* are relevant and must be applied to the matter at hand.

[11] Counsel for the Respondent argued that, on the evidence before it, the General Division reasonably concluded that the Appellant did not have a continuing intention to pursue the appeal or a reasonable explanation for her delay in doing so. She submitted that there was no evidence that the Appellant took any steps to prosecute her claim or contact the Tribunal between the time that the reconsideration was communicated to her and when she requested an extension of time. This request was made approximately eleven months after the decision was communicated to her. The Appellant did not dispute this, but argued that the

General Division decision should not stand as it did not consider the interests of justice in making its decision, and did not provide adequate reasons for its decision.

[12] It is clear that when deciding whether to grant an extension of time to file an appeal, the factors set out in *Gattellaro* are to be considered. However, in *Attorney General of Canada v. Pentney*, 2008 FCA 96 the Federal Court of Appeal clarified this , stating that a fifth factor should also be considered, being ”all other relevant factors particular to the case”. This is to ensure that the underlying consideration, ensuring that justice is done between the parties, is met. This was again restated by the Federal Court of Appeal *in Canada (Attorney General) v. Larkman*, 2012 FCA 204 where the Court held that while the factors listed in *Gattellaro* are to be considered the overriding consideration is that the interests of justice be served.

[13] In *Larkman* the Court also concluded that the principles of finality of litigation and certainty must form part of the assessment of the interests of justice. In that case the Court concluded that the rationale for a strict approach to the time limit to file the appeal was less compelling as the issue before it was very narrow and affected only the parties to that litigation (and the claimant’s descendants). On this basis, the court concluded that finality and certainty did not deserve as much prominence. I am satisfied that the reasoning applies in this case. The issues at hand are narrow and affect only the parties to this case. The decision is not binding on other decision makers. It does not appear that the General Division turned its mind to this when it made its decision.

[14] In addition, I am not persuaded that the General Division turned its mind to the overall consideration of the interests of justice when it made its decision. The General Division mechanically set out and applied the *Gattellaro* factors without considering all of the circumstances of the case before it.

[15] The Respondent also submitted that an extension of time to file an appeal is not a remedy that is granted as of right, but is a discretionary remedy. Counsel contended that the General Division exercised its discretion appropriately, and that it is not for the Appeal Division to reweigh the evidence to reach a different conclusion. While it is correct that a discretionary decision is to be given deference, it cannot stand if the relevant legal principles were not considered in reaching the decision.

[16] Counsel for the Respondent argued that although the General Division decision could be interpreted to conclude that there was a "disconnect" between the Member's review of the *Gattellaro* factors and the decision reached, in fact this did not exist. She contended that the General Division correctly set out the legal test to be met by the Appellant in order to obtain an extension of time, and that it was reasonably applied to the evidence. She contended that the application of the *Gattellaro* factors itself demonstrated that the General Division examined the interests of justice. With respect, I disagree. The General Division mechanically applied the *Gattellaro* factors to the evidence before it.

[17] In addition, the decision did not explain why it gave greater weight to the lack of explanation for delay than to the other factors it considered. This resulted in the "disconnect" referenced by counsel for the Respondent. One of the purposes of written reasons for a decision is to allow the parties to understand why a decision was made. In this case, this purpose was not achieved.

[18] In *MacDonald v. Minister of Employment and Social Development*, (T-674-15, November 6, 2015,unreported) the Federal Court considered an application for judicial review of a Social Security Tribunal decision that denied an extension of time to file an appeal to the Appeal Division of the Tribunal. The Court granted the application on the basis that the Tribunal did not look at any factors except those set out in *Gattellaro* and did not explain why one factor outweighed the others. Similarly the General Division decision before me did not set out how its conclusion was reached after these factors were applied to the facts before it.

[19] For all of these, I am not persuaded that the General Division turned its mind to the overall consideration of the interests of justice, including a balancing of the need for finality and doing justice between the parties, when it made its decision. The reasons for the decision were also inadequate as the General Division did not explain how the factors considered were weighed to reach the conclusion.

[20] The General Division decision therefore contains an error of law, which is a ground of appeal under section 58 of the Act. The appeal is allowed.

REMEDY

[21] Section 59 of the *Department of Employment and Social Development Act* sets out the remedies that the Appeal Division can give. It is not appropriate in this case for me to give the decision that the General Division should have as I have not heard any of the evidence. This matter is referred back to the General Division for the request for an extension of time to file the appeal to be reconsidered in light of these reasons. The General Division decision dated April 27, 2015 is to be removed from the record. To avoid any possibility of an apprehension of bias the matter should be considered by a different General Division Member.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

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.