



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 42

Date: January 21, 2016

File number: AD-16-119

APPEAL DIVISION

Between:

A. R.

and

Minister of Employment and Social Development

Respondent

Leave to Appeal

Decision by: Hazelyn Ross, Member, Appeal Division

Canada

DECISION

[1] The Application to extend the time for filing the Application for leave to Appeal, (the Application), is granted.

[2] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is granted.

INTRODUCTION

[3] In a decision, issued September 2, 2015, the General Division of the Tribunal found that the Applicant did not have a “severe and prolonged disability” as defined by paragraph 42(2)(a) of the CPP. Accordingly, she was not entitled to receive a *Canada Pension Plan* (CPP) disability pension. The Applicant seeks leave to appeal the General Division decision.

GROUND OF THE APPLICATION

[4] The Applicant submits that the General Division made several errors that constitute breaches of subsection 58(1) of the *Department of Employment and Social Development* (DESD) Act. The errors include a breach of natural justice that arose when the General Division issued its decision before the time for making submissions had passed. The Applicant also submitted that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

PRELIMINARY ISSUE

[5] The application is a late-filed. The Applicant indicated that she received the General Division decision on September 15, 2015, while the Tribunal received the Application on January 4, 2016. (AD1-3) This is some twenty-one days after the 90 day time limit for filing provided for by paragraph 57(1)(b) of DESD Act. Counsel for the Applicant requested that the Appeal Division extend the time for filing the Application on the basis that the Applicant had always had a continuing intention to pursue the appeal. Counsel for the Applicant also submitted that the Respondent would not be prejudiced if the time for filing was extended, and, also, that granting the extension would be in the interests of justice.

[6] The Appeal Division must decide whether to allow the application to extend the time for filing the Application.

[7] In determining the Application to extend the time for filing the Appeal Division considered whether:

1. the Applicant had a continuing intention to pursue the appeal;
2. the matter discloses an arguable case;
3. the Applicant has put forward a reasonable explanation for the delay;
4. whether the Respondent would be prejudiced if the Tribunal were to extend the time for filing the appeal; as well as
5. the facts of the case.

[8] In so doing, the Appeal Division applied dicta contained in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and *Larkman* 2012 FCA 204. The first four considerations are colloquially referred to as the *Gattellaro* factors. The latter is an extension set out in *Hogervorst* and *Larkman*, which has at its core the desire to ensure that justice is done between the parties.

[9] For the following reasons, the Appeal Division granted the application to extend the time for filing the Application for leave.

[10] First, in the view of the Appeal Division, the Applicant has demonstrated a continuing intention to pursue the Appeal. While late, the Application is not egregiously so. Second, given the early stage of the appeal proceeding, allowing the extension would result in little prejudice to the Respondent. Furthermore, and perhaps, most importantly, the Appeal Division finds that circumstances raised in the present appeal point to a strong rationale to grant the extension to file the Application. Accordingly, the Appeal Division grants an extension of time to file the Application.

ISSUE

[11] The issue on this Application is, “does the appeal have a reasonable chance of success?”

THE LAW

Leave to Appeal

[12] 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 *Hogervorst* 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.

[13] 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, that the General Division has committed a breach of natural justice or has failed to act in accordance with or to exercise its jurisdiction; erred in law; or based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.³

ANALYSIS

[14] In order to be satisfied that an appeal has a reasonable chance of success, the Appeal Division must first find that, were the matter to proceed to a hearing,

(a) at least one of the grounds of the Application relate to a ground of appeal; and

¹ 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 –**

- 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.

(b) there is a reasonable chance that the appeal would succeed on this ground.

For the reasons set out below the Appeal Division is satisfied that this appeal would have a reasonable chance of success.

[15] Counsel for the Applicant submitted that the General Division committed a breach of natural justice when it issued its decision before the time for filing submissions had passed. Counsel for the Applicant indicated that,

“on 19 August 2015, the applicant's representative received a letter dated 13 August 2015 (Tab 1), in which the Social Security Tribunal decided "that a further hearing is not required", thereby denying the applicant an opportunity to provide testimonial evidence. Instead, the Tribunal provided the parties until 9 September 2015 to file additional documents or submissions, and until 9 October 2015 to respond to any documents filed during the Filing Period.”

[16] In fact, the letter of August 13, 2015 advised the parties of the General Division's intent to make a decision on the basis of the documents that were before it, while at the same time setting out certain deadlines by which the parties should either file their submissions or responses to submissions. The letter of August 13, 2015 appears to have repeated the content of earlier communication as a letter dated August 11, 2015 contains the following paragraph:

“As mentioned in the Tribunal's letter dated **August 10, 2015**, the parties have until **September 9, 2015** to file additional documents or submissions, and until **October 9, 2015** to respond to documents filed during the Filing period. Documents filed after these deadlines will be provided to the other party but they will be considered only at the Tribunal Member's discretion. Parties will be informed whether documents filed late will be excluded or considered by the Tribunal Member in making the decision, either in writing or during the hearing.”

[17] The General Division issued its decision denying payment of the disability pension on September 2, 2015. However, this was a week before the date that General Division had allowed, and advised, the parties by which they should file additional documents or submissions. In rendering its decision on September 2, 2015, the General Division denied the parties the opportunity to file additional submissions. In fact, on September 8, 2015, Counsel for the Applicant filed a 46-page document with the General Division, which document the General Division returned without considering.

[18] While the Appeal Division cannot say with certainty that had the General Division considered these additional submissions its decision would have been different, the Appeal Division finds that by issuing its decision before the dates for filing had expired the General Division foreclosed any opportunity to consider the evidence provided by the submissions. In so doing it denied the Applicant a full opportunity to present her case, thereby committed a breach of natural justice.

[19] In the circumstances, the Appeal Division finds that the Applicant has raised an arguable case. Accordingly, the Appeal Division grants the Application.

CONCLUSION

[20] The Application is granted.

Hazelyn Ross
Member, Appeal Division