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

Citation: ***N. N. v. Minister of Employment and Social Development,*** **2016 SSTADIS 96**

Date: February 29, 2016

File number: AD-15-913

APPEAL DIVISION

Between:

N. N.

Appellant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

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

Canada

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] In a decision dated December 8, 2015 the Appeal Division granted the Appellant leave to appeal the decision of the General Division that refused to extend the time for making an appeal. The Appeal Division granted leave on the narrow ground that the General Division did not demonstrate in its decision that it had taken into consideration the best interest of justice.

SUBMISSIONS

[3] Pursuant to section 42 of the *Social Security Tribunal Regulations*the[1] parties to the appeal had forty-five days after leave to appeal was granted in which to file with the Appeal Division either submissions or a notice that they have no submission to file. (Notice of No Submissions) The Appeal Division received submissions from the Respondent; while the Appellant filed a letter Notice of No Submissions.

[4] In his submissions, Counsel for the Respondent took the position that the General Division had properly refused to extend the time limit for making an appeal to the General Division and had also properly dismissed the Appellant's appeal. As indicated earlier, Counsel for the Appellant made no further submissions, but relied on the letters it had sent to the General Division.[2]

[5] Counsel for the Respondent also made submissions respecting whether the Appeal Division ought to apply a "standard of review" analysis to the instant appeal. In the submissions of Counsel for the Respondent it was appropriate for the Appeal Division to do so because of the genesis and stated purpose of the Social Security Tribunal, (the Tribunal), and the role of the Appeal Division that was delimited in the statutory scheme.

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[1] *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 2,*

[2] [2] The text of Counsel's letter to the Appeal Division is:
"Thank you for your letter dated October 9, 2015.
Please be advised we do not have further submissions.
We previously sent letters dated June 5, 2014, August 21, 2014, January 15, 2015 and May 1, 2015.
If you have any questions or concerns, please do not hesitate to contact our office"

[6] This position is in contrast to that of recent decisions of the Federal Court and the Federal Court of Appeal that enjoin the Appeal Division not to engage in a "standard of review analysis" and to confine its inquiry to an assessment of whether or not the General Division breached any of the provisions of section 58(1) of the DESD Act. *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 CAF 242 (CanLII), 2015 FCA 242; *Maunder v. Canada (Attorney General),* 2015 FCA 274, affirming *Jean/Paradis; Tracey v. Canada (Attorney General)* 2015 FC 1300.

[7] Until the issue is definitively decided the Appeal Division will be guided by the decisions of the Federal Court and the Federal Court of Appeal.

.**ISSUE**

[8] The issue in this appeal is: "did the General Division err in law by failing to consider the interests of justice when it refused to extend the time for filing an appeal?

THE APPLICABLE LEGAL PROVISIONS

[9] The grounds of appeal are contained in section 58 of the *Department of Employment and Social Development (DESD) Act.* The grounds involve breaches of natural justice and errors of jurisdiction; error of law; or error of fact: -

> **58(1)** *Grounds of Appeal* – 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.

[10] Leave to appeal was granted under the second ground.

Criteria for Extending Appeal Time Limit

[11] Section 52 of the DESD Act sets out the time limit for bringing an appeal to the General Division of the Tribunal. Subsection 52(2) provides for extensions to the time limit for bringing an appeal but caps that time at one year.

> **52 (2) Extension** – The General Division may allow further time within which an appeal may be brought, but in no case may an appeal ne brought more than one year after the day on which the decision is communicated to the appellant.

[12] In addition to the statutory provision, case law has set out criteria by which the determination whether or not to extend a time limit ought to be assessed. In *Gattellaro*[3] the Federal Court identified four factors that should form the basis of the enquiry, namely, whether: -

a. the applicant had a continuing intention to pursue the appeal;
b. the matter discloses an arguable case;
c. there was a reasonable explanation for the delay; and
d. there would be prejudice to the other party in extending the deadline.

[13] In *Hogervorst*[4] the Federal Court of Appeal was at pains to state that the *Gattellaro* test is flexible and must be geared to ensure that justice is done between the parties. Ensuring that justice is done between the parties was identified as the underlying consideration in an application to extend time.

[14] Counsel for the Respondent argued that the Federal Court of Appeal did not expand *Gattellaro,* rather it pointed to the *Gattellaro* factors as a means of ensuring the fulfilment of the underlying consideration, namely that justice be done between the parties. Implicit in the position taken by Counsel for the Respondent is the submission that the "interest of justice" is not a separate category that the General Division needed to apply when it considered whether or not to extend the time for filing the appeal. However, this debate is not the purpose of this particular exercise. Suffice it to say that it is the view of the Appeal Division that the interest of

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[3] *Canada (Minister of Human Resources Development) v. Gattellaro,* 2005 FC 883.
[4] [4]*Canada (Minister of Human Resources Development) v. Hogervorst,* 2007 FCA 41

justice is, at the very least, a gloss on the *Gattellaro* factors, which position appears to be borne out in *Larkman* 2012 FCA 204.

[15] By contrast, Counsel for the Appellant steadfastly maintains that there is no question of the appeal being late. Counsel relies on the letters to the Tribunal dated June 5, 2014, August 21, 2014, January 15, 2015 and May 1, 2015.

[16] The letter of June 5, 2014 was the means by which counsel for the Appellant signalled his intention to appeal. The remaining letters contain and restate the position of Counsel for the Appellant that the Appeal had been filed in time and that there was no reason for Counsel to request an extension of the time limit for filing the appeal.

[17] Counsel for the Respondent has pointed to two issues pertinent to these proceedings. Counsel argues that there never was a properly filed appeal before the General Division.
Counsel also argues that the given that there was never a proper appeal before the General Division, the appeal became statute barred as of March 26, 2015.

[18] While these issues were not part of the questions raised at the Leave to Appeal stage, these questions are, in the view of the Appeal Division, intricately tied to the question of whether or not the General Division had failed to address the interests of justice

Did the General Division had fail to address the interests of justice

[19] In its decision, the General Division found that while the Appellant had an arguable case and that there was no evidence that the Respondent would be prejudiced by the late appeal, these two factors were outweighed by the failure of the Appellant to display a continuing intention to appeal as well as to provide a reasonable explanation for the delay. The General Division found that the only indication of some intention to pursue the appeal was that the Appellant's counsel submitted an incomplete appeal. (GD decision at para. 31)
[20] At paragraph 5 of the decision, the General Division cites Larkman, noting that it stands for the proposition that "the overriding consideration is that the interests of justice be served" (GD decision) This is the sum total of any mention of the concept of "interest of

justice." In the view of the Appeal Division, even without it being a stand-alone consideration, the General Division was required to address the question of the interest of justice in its decision, which it did not do. The Appeal Division finds this was an error of law.

There was no appeal properly before the General Division

[21] Notwithstanding this finding, the Appeal Division finds that the appeal cannot succeed for other reasons, including the fact that at no point was there a completed appeal properly before the General Division. This, despite the fact that the Tribunal gave the Appellant ample opportunity to perfect the appeal. For example, in its letter of July 5, 2014, the Tribunal expressly advised the Appellant and his counsel that, "an appeal is not properly filed until the Tribunal has received all of the required information." Counsel for the Appellant took the position that the appeal had been filed in time. (see letter of May 2015)

[22] The Appeal Division disagrees. Section 40 of the Tribunal *Regulations,* sets out the form and contents of an appeal to the Appeal Division. The original letter/Notice of Appeal did not meet the requirements set out in Section 40. The Appellant and his counsel were given an opportunity to rectify the lacunae and to bring the Notice of Appeal in conformity with Tribunal Regulations, before the expiry of the 90 day time limit. They failed to do so. The Tribunal did not receive a response to its letter of July 5, 2014 advising the Appellant and his counsel that the Notice of Appeal was incomplete until August 21, 2014, which was some fifty-two days after the time limit had expired. At this point, the appeal was late and the Appellant was required to make an application to extend the time for filing the appeal, which application his counsel steadfastly refused to make.

[23] It appears that at no time did the Tribunal ever state that the appeal was complete. Once the 90 day time limit had passed the Tribunal focused on the fact that the Appeal was late and made every effort to allow Counsel for the Appellant to make the application to extend the time limit. Thus, there being no complete appeal before the General Division, its error of law is rendered moot and does not affect the outcome of this appeal.

The Appeal is Statute-barred

[24] Furthermore, once the one-year time limit for extending the time to make the appeal had expired, the Appellant was then statute-barred from making his appeal. There was no argument that the one year time limit had not expired. The one year time limit expired at the end of March 2014, which is well before the General Division even considered the question. Accordingly, the Appeal Division is persuaded that absent an error that goes to the time limit, any error of law could not affect the General Division decision.

[25] For all of the above reason, the Appeal Division dismisses the appeal.

DECISION

[26] The Respondent has asked the Appeal Division to exercise its statutory authority under section 59 of the DESD Act to give the decision that the General Division should have given. The Respondent submitted that the appropriate decision was that the "appeal was not brought within the one year statutory absolute time limit because the Appellant did not request an extension of time and no extension of time was granted prior to the expiry of the statutory time limit". (AD4)

[27] On considering the submissions of the parties, and in light of the findings made above it is the decision of the Appeal Division that:

The Appeal is dismissed because it was not brought within the one year statutory absolute time limit because the Appellant did not request an extension of time and no extension of time was granted prior to the expiry of the statutory time limit.

Hazelyn Ross
Member, Appeal Division