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

Citation: ***A. P. v. Minister of Employment and Social Development*****, 2016 SSTADIS 112**

Date: March 15. 2016

File number: AD-15-1121

APPEAL DIVISION

Between:

A. P.

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 allowed.

[2] The matter is referred back to the General Division for redetermination by another Member.

INTRODUCTION

[3] On December 8, 2015 the Appeal Division granted the Appellant's application for leave to appeal the decision of the General Division that refused to extend the time for filing her Notice of Appeal.

[4] The Appeal Division granted leave on the basis that in deciding whether or not to grant the extension of time for filing the notice of appeal the General Division may not have considered the interests of justice.

BACKGROUND

[5] The Appellant applied for a *Canada Pension Plan* (CPP) disability pension. The Respondent denied her application both initially and upon reconsideration. The reconsideration decision was issued on October 24, 2013. On April 29, 2014, the Appellant filed a notice of appeal with the Tribunal that was not only incomplete; it was also late. The Appellant explained the late filing by stating that she had "misfiled her papers". The Tribunal asked the Appellant to complete the application and to provide reasons for the late filing by June 22, 2015. The Appellant never complied with the Tribunal's request.

[6] The decision of the General Division hinged on two points, namely, that the Appellant had not provided a satisfactory explanation for the delay in filing the Notice of Appeal; and had not demonstrated a continuing intention to pursue her appeal.

SUBMISSIONS

[7] The Appeal Division received submissions from the Respondent while the Appellant elected to rely on the medical documents that had been filed in the matter. The gist of the

Respondent's submission is that the General Division did not err in coming to its decision. Counsel for the Respondent took the position that, following *Canada (Minister of Human Resources Development) v. Hogervorst.* 2007 FCA 41 consideration of the four factors commonly referred to as the *Gattellaro*[1] factors was a means of ensuring that the underlying consideration that justice is done between the parties was addressed.

ISSUE

[8] The Appeal raises the following questions:

> 1) Is "the interests of justice" a criterion separate from the four factors cited in Gattellaro*?*
> **2)** Did the General Division fail to consider the interests of justice when it refused to extend the time for filing the notice of appeal? If it did, was this failure an error of law?

APPLICABLE LAW

[9] Three grounds of appeal are set out in subsection 58(1) of the *Department of Employment and Social Development Act*, (the DESD Act). They are that,

> **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.

ANALYSIS

Is the "interests of justice" a separate factor that must be considered when deciding whether or not to extend time?

[10] In recent decisions the Appeal Division has taken the position that when considering whether or not to extend time, the General Division decision must demonstrate that the best interests of justice was considered, otherwise, the General Division may have erred in law. Indeed, this was the basis on which leave to appeal was granted in this case. The submissions of Counsel for the Respondent indicate that it is perhaps apt to further elaborate this position.

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro,* 2005 FCA 883.

[11] In *Gattellaro,* the Federal Court of Appeal set out the following four considerations that a decision-maker must address when considering an application to extend a time limit, namely:-

a. That there is and was a continuing intention on the part of the Appellant to pursue the appeal;
b. Whether the subject matter of the appeal discloses an arguable case;
c. Has the Appellant put forward a reasonable explanation for the delay; and
d. The possible prejudice to the Respondent if the extension was to be granted.

[12] In *Hogervorst,* Létourneau, J.A. writing for the Court noted that the test set out above was "not in contradiction with the statement of this Court made more than twenty (20) years ago in *Grewal v. Canada (Minister of Citizenship and Immigration),* [1985] 2 F.C. 263 that the underlying consideration in application to extend time is to ensure that justice is done between the parties."

[13] Létourneau, J.A. went on to state that the test was "a means of ensuring the fulfilment of the underlying consideration" and that "an extension of time can still be granted even if one of the criteria is not satisfied." The Appeal Division finds that these statements are not inconsistent with those made in *Canada (Attorney General) v. Larkman, 2012 FCA 204* where the Federal Court of Appeal described the role of the *Gattellaro* factors in the following terms:-

> [62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, *supra* at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal,* at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 (CanLII) at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195 (CanLII), 89 Admin LR (4th) 1.

[14] *Larkman* appears to have given rise to ambiguity as to the status of the "best interest of justice" in the consideration of the application to extend time.

[15] The Federal Court of Appeal stated at paragraph 85 of the *Larkman* decision that "the overriding consideration is that the best interests of justice be served" and Stratas, J. A. made findings in regard to each of the four *Gattellaro* factors before going on to consider the "interests of justice." He found that the unusual nature of the case presented by *Larkman* required a less strict approach to the thirty day deadline for filing applications for judicial review in order to meet the interests of justice requirement. Stratas, J.A. posed the following question

> [90] "the overall question is this: is it in the interests of justice that the extension of time be granted and the application for judicial review be permitted to proceed?"[2]

[16] This question appears to the Appeal Division to impose "best interests" as a separate consideration altogether.

[17] Having come to this conclusion, the Appeal Division turns to the other questions set out as issues in this appeal.

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[2] Per Stratas, J.A. in *Attorney General of Canada v. Larkman,* 2012 FCA 204

[86] In considering this, I am mindful that the Federal Court and this Court have underscored the importance of the thirty day deadline in subsection 18.1(2) of the *Federal Courts Act*. Many authorities suggest that unexplained periods of delay, even short ones, can justify the refusal of an extension of time: *Powell v. United Parcel Service*, 2010 FCA 286 at paragraph 3; *Kobek v. Canada (Attorney General)*, 2009 FCA 220 at paragraphs 2 and 5; *McBean v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1149; and many others

[87] The need for finality and certainty underlies the thirty day deadline. When the thirty day deadline expires and no judicial review has been launched against a decision or order, parties ought to be able to proceed on the basis that the decision or order will stand. Finality and certainty must form part of our assessment of the interests of justice.

[89] In this case, the rationale for a strict approach to the thirty day deadline carries less force. This is a most unusual case. The Order in Council is very narrow. It affects only Ms. Larkman and any descendants she might have. The ground for challenge is very narrow. It concerns particular actions by particular people at a particular time. Finality and certainty do not deserve as much prominence in a case such as this. A late judicial review will not disrupt the administration of justice or detrimentally affect the public interest.

[90] The overall question is this: is it in the interests of justice that the extension of time be granted and the application for judicial review be permitted to proceed?

[91] This question can be rephrased, incorporating many of the circumstances and considerations discussed in these reasons. Although Ms. Larkman cannot satisfactorily explain several months of delay, should she be permitted to continue her multi-year quest – a quest with some potential merit that, if successful, will affect only her and any descendants she may have, undo serious misconduct, and reverse the effects of a policy condemned by a Royal Commission and our highest Court as oppressive and discriminatory?

Did the General Division fail to consider the interests of justice when it refused to extend the time for filing the notice of appeal? If it did, was this failure an error of law?

[18] As stated earlier, the General Division referred to the interests of justice in the final paragraph of the decision. However, the decision contains no discussion on whether it would serve the interests of justice to allow the extension of time given the facts of the particular case. Thus, the first question is answered in the affirmative. In the view of the Appeal Division the General Division erred in law because *Larkman* required it to ask the question whether it was in the interests of justice to allow the extension of time.

The Circumstances of the Case

[19] The General Division found that the Appellant did not have a continuing intention to pursue her appeal and also did not respond in a timely manner to the Tribunal's request for additional information. It may well be argued that even if the General Division had asked the question whether the interest of justice require that the extension of time be granted, these findings may well have led to the same conclusion it did. However, on her behalf, a relative of the Appellant has submitted that the Appellant's conduct results from the fact that she has been suffering from a major depressive disorder for some three years. Indeed, the medical report that was submitted by the Appellant's family physician does list major depressive disorder and psychosis among her disabling conditions (GD1-62) and there is some evidence that she has been treated for these conditions.

[20] The Appellant makes the further argument that her Notice of Appeal was late by seven days only. However, given that she never filed a complete application, the Appeal Division finds this argument to be less than persuasive.

[21] The Appeal Division poses a similar question to that of Stratas, J.A in *Larkman,* namely, "is it in the interests of justice that the appeal be allowed and the extension of time be granted?" When the circumstances of this case are considered, namely that there is some evidence that the Appellant suffers from a mental health condition(s) and, the further submission that her mental health condition (s) was instrumental in her late filing, the Appeal Division finds that it is in the

interests of justice to allow the appeal and to extend the time for filing the appeal to the General Division.

[22] Accordingly, the Appeal is allowed.

CONCLUSION

[23] Given that there has been no determination on the merits of this case the Appeal Division finds that, pursuant to section 59 of the DESD it is appropriate to return this matter to the General Division for redetermination by another Member.

Hazelyn Ross
Member, Appeal Division