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

Citation: *S. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 140

Date: April 20, 2016

File number: AD-16-129

APPEAL DIVISION

Between:

S. F.

Applicant

and

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

Respondent

Application to Extend Time for Filing Appeal

Decision by: Hazelyn Ross, Member, Appeal Division

Canada

DECISION

[1] The Application for leave to appeal is refused.

INTRODUCTION

[2] The Applicant's application for a *Canada Pension Plan*, (CPP), disability pension was denied both initially and upon reconsideration. The reconsideration decision is dated October 22, 2013. On December 19, 2014 *the Social Security Tribunal,* (the Tribunal), received notice of appeal of the reconsideration decision. In a decision dated September 30, 2015 a member of the Tribunal's General Division found that the appeal had not been brought in time. The Member refused to extend the time for bringing the appeal. The Applicant seeks leave to appeal the decision of the General Division, (the Application).

GROUNDS OF THE APPLICATION

[3] On his behalf, Counsel for the Applicant submitted that in denying the request to extend the time for filing the appeal, the General Division committed a breach of natural justice. His arguments are set out below:-

> By correspondence dated June 21, 2013 this office wrote to the Tribunal confirming our representation of Mr. S. F. and further confirming our client's request for a reconsideration of the April 2, 2013 Decision.
>
> Having received confirmation of this office's involvement further notices and communications should have been directed to this office. It was Mr. Kelly's belief that the Tribunal was undertaking the reconsideration process which often involves a significant period of time.
>
> The Tribunal issued its Decision denying the reconsideration by letter dated October 22, 2013. That letter however, was not sent to this office, despite the Tribunal's knowledge of Mr. Kelly's retainer. The letter was only sent to Mr. S. F. directly who assumed that a copy of the letter was also forwarded to our office and that we were proceeding with the appeal in accordance with out retainer.
>
> Coincidently, (sic) our office forwarded a follow up letter to the Tribunal dated October 23, 2013 (I day after the date of the Decision denying the reconsideration).
>
> Once again the Tribunal did not respond to our letter of October 23, 2013. Our letter of October 23, 2013 made it clear that we had not received any decision and that we remained counsel of record for Mr. S. F.

The Tribunal has never explained why there was no response provided to either of our letters dated June 21, 2013 and October 23, 2013. There is obviously no good reason why the Tribunal would not communicate with the Applicant's counsel. The lack of courtesy (apart from negligence) involved in the lack of reply from the Tribunal is discouraging.

Following the October 23, 2013 letter, the matter came forward on our offices internal diary system but was re-diarized as it was noted that we had not yet received any reply from the Tribunal with respect to our letters of June 21, 2013 and October 23, 2013. In its decision dated September 30, 2015 the Tribunal places the entire onus on Mr. S. F. to keep his counsel informed when in fact it was the Tribunal that completely failed to adhere to standard practices with respect to communicating with Applicant's counsel.

On July 24, 2014 our office again wrote to the Tribunal to confirm that no decision had been received and requesting the status of this matter. For the first time our office was then advised of the Decision that had been rendered on October 22, 2014. The Tribunal offered no explanation as to why they had not responded to our letters dated June 21, 2013 and October 23, 2013.

It is ludicrous for the Tribunal to assign all of the fault with this matter to Mr. S. F. when it was the Tribunal who had multiple opportunities and notices that proper communications had not been made with the Applicant's counsel.

It is further noted that there is no prejudice whatsoever to any other party that would be caused by an order granting the requested extension.

After learning of the October 22, 2013 Decision this office moved promptly to notify the Tribunal of the breakdown in communication and to request that the extension be granted so that the appeal could proceed as it would have had the Tribunal properly communicated with counsel.

It is clear that Mr. S. F. was, at all times, relying on counsel to handle the matter for him. It is submitted that an Applicant relying upon counsel is entirely appropriate. Mr. S. F. had no knowledge that we did not receive the October 22, 2013 decision letter and that we were not addressing the matter accordingly.

Even if the fault could be placed with this firm, which we adamantly deny given the three letters (attached) that were forwarded to the Tribunal, it would be entirely inappropriate, and contrary to Canadian legal principles, to punish an innocent party as a result of matters arising from counsel's inadvertence. This is particularly so when there is no prejudice to any other party."

THE LAW

[4] Appeals from decisions of the General Division are governed by sections 55 to 59 of the *Department of Employment and Social Development, (DESD), Act.* There is no automatic right of appeal. Pursuant to section 56 of the DESD Act, an applicant must first obtain leave to appeal.

55. *Appeal* – Any decision of the General Division may be appealed to the appeal Division by any person who is the subject of the decision and any other prescribed person.

56. *Leave* – (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.

(2) *Exception* – Despite subsection (1), no leave is necessary in the case of an appeal brought under subsection 53(1) summary dismissal by the General Division.

[5] The grounds of appeal are set out at subsection 58(1) of the DESD Act, namely, an error of law; error of fact; or a breach of natural justice or errors respecting the jurisdiction of the General Division on the part of the General Division.[1]

Appeals to the General Division Time Limits

[6] Section 52 of the *Department of Employment and Social Development Act*, (DESD Act), provides for appeals to the General Division within certain time limits, as set out below:

> **52.** ***Appeal - time limit* – (1**) An appeal of a decision (of the Minister) must be brought to the General Division in the prescribed form and manner and within,
> (a) in the case of a decision made under the *Employment Insurance Act*, 30days after the day on which it is communicated to the appellant; and
> (b) in any other the case, 90 days after the day on which it is communicated to the appellant.

[7] Subsection 52(2) of the DESD Act allows the General Division to extend the time within which an appeal may be brought, but limits such extensions to one year after the day on which the decision is communicated to an appellant.

[8] Appeals from denials of a CPP disability pension are considered late, where they are filed after 90 day from the date on which the denial decision was communicated to the Applicant. In the instant case, the Applicant has stated that he received the reconsideration decision on or about October 29, 2013. (GD1-A2) Therefore, he had 90 days from October 29, 2013 in which to file his application for leave to appeal. The General Division received the Application on December 19, 2014 which is some thirteen and a half months after the Applicant received the reconsideration decision. (GD1) On its face the appeal was received late.

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[1] 1 **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.

ISSUE

[9] The Appeal Division must decide whether it should grant leave to appeal the General Division decision refusing to extend the time for filing the appeal.

ANALYSIS

[10] The legal test to be applied in deciding applications for leave to appeal is whether the Appeal division is satisfied that the appeal has no reasonable chance of success. *Tracey v. Canada (Attorney General)* 2015 FFC 1300. In deciding the instant Application, the Appeal Division considered the General Division decision; materials filed for the General Division hearing; the governing law; and the Applicant's submissions all with a view to determining whether the General Division committed the errors alleged.

The Alleged Breaches of Natural Justice

[11] The Applicant submits that there have been breaches of natural justice stemming from the Tribunal's failure to communicate with his counsel. To support the allegations, Counsel for the Applicant attached three letters that he sent to Service Canada regarding the Applicant. The first letter is dated April 21, 2013. It is addressed to the attention of S. Booker RN. This first letter advises Service Canada that Counsel is acting for the Applicant. It was not accompanied by the Applicant's signed authorisation to disclose. The letter concludes with the following statement:

> "Woe (sic) would ask that you would reconsider your decision in relation to Mr. S. F.'s entitlement and thereafter advise as to your position."

[12] Service Canada received this letter on July 2, 2013 and on August 12, 2013, (GD2-13) wrote to the Applicant advising him that it had received a request for reconsideration from McNeely, Kelly, Barristers and Solicitors. By the same letter, Service Canada asked the Applicant to complete an authorisation form which would then allow Service Canada to communicate with the lawyers. Service Canada stated that it was enclosing the form; and directed the Applicant to complete and return it to Service Canada. (GD2-12)

[13] The second letter is dated October 23, 2013 and is addressed to Service Canada. This letter is from Counsel for the Applicant. In this letter, Counsel advises that,

- He was enclosing the Applicant's signed authorisation;
- The Applicant had provided him with a copy of Service Canada's letter of August 12, 2013;
- He noted that Service Canada had advised the Applicant it was proceeding with reconsideration of its earlier decision.

[14] In a letter dated July 29, 2014, Counsel for the Applicant wrote to Service Canada to advise that he had not received a response to his letter of October 23, 2013. He asked to be updated on the status of the Applicant's request for reconsideration.

[15] The reconsideration decision is dated October 22, 2013. It is addressed to the Applicant only and contains the note that service Canada "is unable to send your lawyer a copy of this letter as we have no written authorization from you on file." The reconsideration decision is dated the day prior to the date on counsel's second letter.

[16] The reconsideration decision letter also contains advice on how the Applicant could proceed if he disagreed with the decision. This advice is set out under the rubric, "If you disagree with our decision" (GD2-10)

> "You have the right to appeal this decision to the General Division, Income Security Section of the Social Security Tribunal. If you decide to appeal, **you must submit a *Notice of Appeal* that contains all the required information within 90 days** of the date you receive this letter**. For a copy of the *Notice of Appeal* form, instructions on how to fill it out and details on how to appeal a decision,** please visit their Web site at www.canada.gc.ca/sst-tss, or you may also call free of charge at 1-877-227-8577. For your *Notice of Appeal* to be accepted, you must provide all the required information **and attach all required documents** before mailing it to the following address:
>
> Social Security Tribunal
> Attention: General Division (IS)
> PO Box 9812, STN T CSC
> Ottawa ON K1G 6S3
>
> *(Typed as it appeared in the letter)*

[17] The Applicant submitted that by ignoring or failing to communicate with his Counsel the Tribunal breached natural justice. His counsel submitted that this presented valid grounds

on which to grant the application to extend the time to appeal to the General Division. Counsel for the Applicant made the argument that as he had advised the Tribunal that he was representing the Applicant the Tribunal was bound by practice, to advise him of any and all decisions taken in regard to the Applicant .

[18] The trouble with this position is that, (a) it was not the Tribunal that "failed to communicate" with Counsel for the Applicant; (b) at the time it sent the reconsideration decision Service Canada did not have the Applicant's authorisation to disclose it to anyone but the Applicant. It may well be that the reconsideration decision and the Applicant's authorisation to disclose "crossed" in the mail, however, the fact is that Service Canada could not send Counsel a copy of its reconsideration decision without the express authorisation of the Applicant which it did not have at the time it did. Service Canada did send a copy of the reconsideration decision to Counsel for the Applicant; however, it sent it almost a year after the decision had been issued.

[19] Counsel for the Applicant then appealed to the Tribunal. The Tribunal received the Notice of Application on December 19, 2014. (GD-1) AS stated earlier, the General Division found that the appeal had been filed out of time and could not be considered because the maximum time permitted for extensions of time had already expired.

[20] Counsel for the Applicant takes objection to the finding of the General Division that the Applicant had not provided a satisfactory explanation for the delay in filing the appeal. The Appeal Division is not persuaded that the facts of the case support his position. It is true that Service Canada did not send Counsel for the Applicant a copy of the reconsideration decision in a timely manner. However, in the view of the Appeal Division, the Applicant is to be taken to have known as far back as late October 2013 that Service Canada had sent this decision to him alone and why. Given that fact, in the view of the Appeal Division, it is reasonable to expect, as the General Division did, that upon the Applicant receiving the unfavourable reconsideration decision, there would have been some type of contact between the Applicant and his counsel to discuss the decision and any next steps. [2]

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[2] The General Division wrote:-

[21] In these circumstances, the Appeal Division is not persuaded that the Applicant provided a satisfactory explanation for the delay when he stated that he had assumed his Counsel was proceeding with filing his Notice of Appeal. By extension, the Appeal Division also finds that the General Division did not commit a breach natural justice.

Did the General Division err by refusing to extend the time for filing the appeal?

[22] In considering an application to extend the time for filing an appeal, the General Division usually considers whether,

a. the Applicant had a continuing intention to pursue the appeal;
b. the matter discloses an arguable case;
c. the Applicant has put forward a reasonable explanation for the delay; and
d. the Respondent would be prejudiced if the Tribunal were to extend the time for filing the appeal; as well as
e. the interests of justice.

[23] In the circumstances of the instant case the General Division was also required to take into consideration subsection 52(2) of the DESD Act. Subsection 52(2) of the DESD Act governs the time limit for bringing appeals to the General Division. It provides as follows:-

> **52. Appeal – Time Limit – (1)** An appeal of a decision must be brought to the General Division in the prescribed form and manner and within,
> (a) in the case of a decision made under the Employment Insurance Act, 30 days after the day on which the decision is communicated to the appellant;
> (b) in any other case, 90 days after the day on which the decision is communicated to the appellant.

[24] The section also provides for the possibility of an extension of the time limit, however, there is a one-year deadline after which no appeal can be brought.

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

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[8]Tribunal finds that the Respondent's reconsideration decision was communicated to the Appellant on October 29, 2013 as declared by the Appellant.
[9] The Appellant filed a Notice of Appeal on December 19, 2014.
[10] The Tribunal finds the failure of the Department to deliver a copy of the reconsideration decision to the Appellant's representative is insufficient grounds to extend the appeal filing period. It was incumbent upon the Appellant to communicate with his representative on a timely basis after his receipt of the reconsideration decision.
[10] The Tribunal finds the failure of the Department to deliver a copy of the reconsideration decision to the Appellant's representative is insufficient grounds to extend the appeal filing period. It was incumbent upon the Appellant to communicate with his representative on a timely basis after his receipt of the reconsideration decision

[25] Cognizant of subsection 52(2), the General Division concluded that the appeal had not been brought in time and, therefore, it could not proceed. The Appeal Division finds no error in the General Division's conclusions. The appeal was brought more than one year after the day on which the decision was communicated to the Applicant; therefore, by operation of subsection 52(a) of the DESD Act, the appeal was statute-barred. The latest the Applicant could have brought the appeal was October 28, 2013. The appeal was not filed until this date had passed. While this provision may work hardship on the Applicant it does not constitute an error of law or a breach of natural justice. This is not a situation where the General Division could make a decision based on an equitable jurisdiction or considerations of fairness. The mandatory language of the statutory provision denies jurisdiction to the General Division to extend the time for filing an appeal beyond the one-year time frame. Therefore, even if the Appellant had had a satisfactory explanation for the delay and even if the General Division had found that positively on all of the factors set out above, this application would still fail.

CONCLUSION

[26] The Applicant applied for leave to appeal the decision of the General Division. The appeal to the General Division was filed more than a year after the day that the reconsideration decision was communicated to the Applicant and is statute-barred by virtue of the operation of subsection 52(2) of the DESD Act. Accordingly, the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[27] The Application is refused.

Hazelyn Ross
Member, Appeal Division