Citation: ***M. S v. Minister of Employment and Social Development,*** **2016 SSTADIS 147**

Date: April 26, 2016

File number: AD-16-435

Appeal Division

BETWEEN:

M. S.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross. Member, Appeal Division

DECISION

[1] The Application for Leave to Appeal is refused.

BACKGROUND

[2] On January 5, 2015 the Applicant filed a notice of appeal with the General Division of the *Social Security Tribunal,* (the Tribunal). On December 14, 2015 the General Division issued a decision in which it found that the notice of appeal had been filed out of time. The Member refused to extend the time for filing the appeal, effectively putting an end to all proceedings before it. The Applicant seeks leave to appeal from the decision of the General Division, (the Application).

GROUNDS OF THE APPLICATION

[3] The Applicant submits that, in refusing to extend the time for filing the appeal, the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. This breach falls under paragraph 58(1)(a) of the *Department of Employment and Social Development,* (DESD) *Act*.

THE ISSUE

[4] The Appeal Division must decide whether the appeal would have a reasonable chance of success.

THE LAW

What must the Applicant establish on an Application for Leave to Appeal?

[5] On an application for leave an applicant is required to satisfy the Appeal Division that his appeal would have a reasonable chance of success. According to ss. 58(2) of the DESD Act, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success". An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success an applicant by raising an arguable

case in his application for leave.[1] An arguable case has been equated to a reasonable chance of success.[2]

[6] The DESD Act sets out the grounds of appeal at ss. 58(1). These are the only grounds of appeal. The provision reads as follows:-

> (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.

[7] In order to grant the Application, the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal set out above.

ANALYSIS

Did the General Division breach ss. 58(1) of the DESD Act?

[8] The Applicant submits as grounds of the Application that due to a back injury that prevents him from working he has been disabled for over 14 years with medical documentation that substantiates his disability. He submitted that his appeal would have a reasonable chance of success because he has paid into the CPP since approximately 1975; moreover he feels strongly that he should be considered disabled. (AD1/AD1B) The Applicant admitted that he filed the notice of appeal late; but states he found the process of appealing confusing and overwhelming. (AD1)

[9] For the following reasons, the Appeal Division finds that the General Division did not breach the provisions of ss. 58(1) of the DESD Act.

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1 *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
2 *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[10] The Tribunal received the Applicant's Notice of Appeal of the reconsideration decision on January 5, 2015. The Applicant indicated on the completed Notice of Appeal that he received the reconsideration decision on March 15, 2013. In fact, the reconsideration decision is dated May 17, 2013. (GD1B) In the notice of appeal, the Applicant stated that he was filing late because he did not think he could. His exact statement was; "I did not appeal within 90 days because I didn't think I could." The Appeal Division infers from this statement that when the Applicant received the reconsideration decision he well knew that he had 90 days from the date on which he received the decision to file his appeal but did not. Therefore, his later disclaimers about the process are, in the view of the Appeal Division, not persuasive.

[11] The General Division considered two factors in its decision. First, it considered whether the appeal was brought more than one year after the date the reconsideration decision had been communicated to the Applicant. It then considered whether to allow an extension of time to allow the Applicant to file the Notice of Appeal. Having taken judicial notice of the fact that in Canada mail is generally received within ten days of mailing, the General Division found that the reconsideration decision was communicated to the Applicant by May 27, 2013. This contrasts with the Applicant's statement that he received the decision on March 15, 2013. However, for the purposes of this decision this discrepancy is not relevant.

[12] The General Division went on to find that pursuant to paragraph 52(1)(b) of the DESD Act, the Applicant had until August 25, 2013 to file his notice of appeal. He filed an incomplete application on January 5, 2015. The Applicant completed his application on May 19, 2015 when he filed the reconsideration decision.

[13] Based on its finding that the Applicant did not file a complete appeal until May 9, 2015, some two years after the reconsideration decision was communicated to him; the General Division found that his appeal was statute-barred by virtue of the operation of ss. 52(2) of the DESD ACT. The subsection provides for extension of time as follows:-

> **(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.

[14] The statutory provision places a clear time limit on any grant of an extension to file an appeal. Thus, having filed the appeal more than one year after the date the decision was communicated to him, the Applicant is squarely caught by the operation of ss. 52(2). Therefore, the General Division did not err in respect of its findings and decision.

[15] Furthermore, even if the appeal was not statute-barred, the Appeal Division finds that the applicant has not put forward any grounds of appeal that would have a reasonable chance of success. Making contributions to the CPP is not a ground of appeal; nor is the Applicant's conviction that he is disabled a ground of appeal. Accordingly, the Appeal Division refuses leave to appeal.

CONCLUSION

[16] On the basis of the foregoing, the Appeal Division finds that the Applicant has not raised grounds of appeal that would have a reasonable chance of success on appeal.

[17] The Application for Leave to Appeal is refused.

Hazelyn Ross
Member, Appeal Division