



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *P. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 162

Tribunal File Number: AD-16-542

BETWEEN:

P. T.

Appellant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: May 4, 2016

REASONS AND DECISION

INTRODUCTION

[1] At its core, this case is about the appropriateness of granting an extension of time to file an appeal with the General Division, when the time permitted for doing so under the *Department of Employment and Social Development Act* (DESDA) has passed.

[2] The General Division rendered a decision on February 26, 2016. It found that the Applicant had filed an appeal more than one year after the Respondent's reconsideration decision had been communicated to him. Therefore, it determined that he was out of time. The Applicant seeks leave to appeal that decision. He alleges that the General Division failed to observe a principle of natural justice and erred in law. He further alleges that subsection 52(2) of the DESDA violates subsection 15(1) of the *Canadian Charter of Rights and Freedoms*. For the Applicant to succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[3] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[4] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

- (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.

[5] The Applicant's representative, a community legal worker, has identified two primary grounds of appeal. The first of these is that the General Division failed to observe a principle of natural justice. The Applicant indicates that he mistakenly believed that his representative had filed an appeal on his behalf on March 25, 2014, within the time permitted under the DESDA. He argues that the General Division should have deemed that he had filed his appeal on March 25, 2014. He argues that, as the Social Security Tribunal was going through a transitional period at about that time, he did not consider it unusual that he did not receive an acknowledgment of his appeal from the Social Security Tribunal. He might have been alerted otherwise to file an appeal, had he been able to expect that the Social Security Tribunal would immediately acknowledge appeals.

[6] Second, the Applicant submits that the General Division erred in law, and should have determined that the one-year deadline in subsection 52(2) of the DESDA violates the Applicant's rights as a disabled person.

[7] The Applicant contends that he held a continued intention to appeal, has a reasonable explanation for the delay in filing the appeal, has an arguable case, and that there is no prejudice to the Respondent.

[8] The Applicant further submits that the Appeal Division has the authority to grant leave to appeal under Rule 55 of the *Federal Courts Rules* and section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21.

[9] The Social Security Tribunal provided a copy of the leave materials to the Respondent. However the Respondent did not file any submissions.

ANALYSIS

[10] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal enumerated under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Natural justice

[11] It is unclear on what basis the Applicant believed that an appeal had been filed on his behalf on March 25, 2014 and that as such, the General Division should deem his appeal to have been filed on that date, rather than on July 17, 2015. However unfortunate, the failure to file in a timely manner was not one which was made by the General Division, nor did any actions or inactions on the part of the General Division result in a breach of the principles of natural justice that the Applicant be afforded a fair hearing and the opportunity to fairly present his case.

[12] Even if I should accept that there were delays on the part of the Social Security Tribunal in acknowledging filed appeals, the Applicant's reliance on this fact is misplaced. There is an onus on the Applicant or his representative to verify that an appeal had been filed, regardless of whether or not the Social Security Tribunal provides an acknowledgment.

[13] In any event, the General Division has no authority to provide the relief which the Applicant seeks. There are no provisions within the DESDA or the *Social Security Tribunal Regulations* which allow an appeal to have been "deemed" to have been filed at some point in the past, well before the appeal was actually filed with the Social Security Tribunal.

[14] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) *Canadian Charter of Rights and Freedoms*

[15] The Applicant alleges that subsection 52(2) of the DESDA violates his rights as a disabled person. He suggests that it is unconstitutional to require a disabled person comply with a short filing period or to be limited to a one-year extension for filing.

[16] The Appeal Division normally will not exercise its discretion and consider constitutional arguments for the first time on appeal, if these arguments have not been raised or considered by the General Division, and particularly where there is no evidentiary record or any findings of fact dealing with issues raised by an appellant: *C.F. v. Minister of Employment and Social Development* (February 24, 2016), AD-15-992 (SSTAD) (currently unreported). I have reviewed the Applicant's submissions regarding the late appeal (GD1 and GD3) and do not see that he raised any *Charter* issues in regards to subsection 52(2) of

the DESDA before the General Division. The Applicant cannot now be permitted to pursue any constitutional arguments on this issue, since he did not pursue them in his appeal to the General Division.

(c) Extension of time – factors for consideration

[17] The Applicant seeks an extension of time to file a notice of appeal with the General Division. He addressed the factors which the General Division generally considers when determining whether to grant an extension of time under subsection 52(2) of the DESDA. These factors are not germane to my consideration, as they do not address any of the grounds of appeal under subsection 58(1) of the DESDA. If the Applicant is suggesting that I consider these factors and determine whether an extension is appropriate, that would call for a reassessment of the issues before the General Division. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. I am not satisfied that there is a reasonable chance that the Applicant will succeed in demonstrating that a reassessment is appropriate.

(d) Authority of the Appeal Division

[18] Finally, the Applicant submits that the Appeal Division has the authority to grant leave to appeal under Rule 55 of the *Federal Courts Rules* and section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21. It seems that the Applicant suggests that it is the General Division which had the authority to grant leave under the *Federal Courts Rules* and the *Interpretation Act*, and that it should have done so.

[19] The *Federal Courts Rules* have no applicability to proceedings before the General Division, as the *Rules* apply to proceedings in the Federal Court of Appeal and the Federal Court. The General Division and for that matter, the Appeal Division, both derive their authority from the DESDA.

[20] There is no suggestion that subsection 52(2) is ambiguous or unclear such that I need to resort to the *Interpretation Act* to determine what was intended by the subsection.

[21] I do not find that the *Federal Courts Rules* or the *Interpretation Act* empower the General Division to grant leave to appeal. I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[22] The Application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division