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

Citation: *M. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 228

Tribunal File Number: AD-16-265

BETWEEN:

M. H.

Applicant

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: Hazelyn Ross

DATE OF DECISION: June 22, 2016

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] This application for leave to appeal concerns an application for disability benefits under the *Canada Pension Plan*, (CPP). The Applicant has been in receipt of a CPP retirement pension since March 1, 2006. Following some health setbacks she applied for disability benefits under the CPP. The Respondent denied her application of April 2011 on the ground that she was already receiving a retirement pension; and in June 2013 she re-applied; again with the same result.

[3] The Applicant appealed the refusal to the Tribunal's General Division. However, when completed, her Notice of Appeal was late. The General Division refused to extend the time limit for filing the Notice of appeal because it found that the Applicant did not have an arguable case and this factor outweighed all others in her favour.

[4] The Applicant then sought leave to appeal from the Appeal Division. In a decision dated June 24, 2015 a Member of the Appeal Division granted leave to appeal on the basis that the General Division may committed an error by failing to consider the incapacity provisions in the CPP when it determined the Applicant's appeal.

[5] The Respondent sought judicial review of the Appeal Division decision granting leave and on February 1, 206, Mosley, J. of the Federal Court granted the application.

[6] In his decision, Mosley, J. held that the Appeal Division had granted leave to appeal on a purely theoretical basis that was unsupported by the record. There was no need to consider the incapacity provisions. He returned the matter to the Appeal Division for redetermination by another Member.

[7] This is the redetermination of the Applicant's application for leave to appeal the General Division decision of April 21, 2015.

GROUNDS OF THE APPEAL

[8] The Applicant sought leave to appeal on the basis that she had been treated unfairly. She pointed to no specific error on the part of the General Division. She cited no specific provision of the *Department of Employment and Social Development, (DESD), Act.* The Appeal Division infers from the statements and tenor of the Applicant's submissions that the only possible ground of appeal that could be argued is that there has been a breach of natural justice.

THE GOVERNING STATUTORY PROVISIONS

Leave to Appeal

[9] Subsections 56(1) and 58(3) of the DESD Act govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[10] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[11] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave. In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[12] The Appeal Division is empowered by the DESD Act to decide appeals on the basis of the following three grounds:-

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.

[4] *Tracey v. Canada (Attorney General),* 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal

[5] In the context of this Application subsection 52(2) of the DESD Act is also relevant. This subsection addresses extension of time limits. It states:-

> **52 (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 Applicant.

ISSUE

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

SUBMISSIONS

[7] The gist of the Appellant's submissions is that had she been informed of the possibility of applying for a CPP disability benefit, she would have done so earlier than April 2011. She placed the blame for her lack of awareness on the Government of Canada, whose employees, she argued ought to have drawn her attention to the availability of disability benefits in her situation. (AD1-1) she described her situation at the time as including the side effects of her treatment for breast cancer and depression.

[8] The Respondent did not file any written submissions regarding the application for leave to appeal.

ANALYSIS

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

[9] The reconsideration decision from which the Applicant sought to appeal is dated May 2, 2014. On July 7, 2014 the Tribunal received her Notice of Appeal. However, the Notice of Appeal was incomplete because the Applicant had omitted the reconsideration decision. The Tribunal informed her of the omission by letter dated July 11, 2014. It asked her to send in the missing reconsideration letter "without delay." At the same time, the Tribunal indicated that should it not receive the complete appeal within the statutory 90-day time limit, the Applicant would have to request an extension of time in which to file the Notice of Appeal. The Tribunal repeated its request by letter dated August 11, 2014, the day on which time the 90-day time limit had clearly expired. The Tribunal received the reconsideration decision on August 15, 2014. However, the Applicant did not request an extension of time to file her Notice of Appeal. This was not done until November 28, 2014.

[10] In deciding whether or not to extend the time for filing the Notice of Appeal, the General Division considered the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. The General Division also considered the requirement set out in *Canada (Attorney General) v. Larkman*, that of the interests of justice.

[11] The General Division examined the Applicant's explanations in the context of *Gattellaro* and L*arkman*. It concluded that a case could be made that the Applicant always had a continuing intention to pursue the appeal; had a reasonable explanation for the delay; and the delay did not seem to occasion any prejudice to the Respondent. However, the General Division found that the Applicant did not have an arguable case because at the time she applied for the disability benefit she was already sixty-eight years old. Paragraph 44 (1)(b) of the CPP is clear that in order to receive disability benefits an applicant must be less than sixty-five years old. The General Division found that as the language of paragraph 44(1)(b) was not permissive, the Applicant's appeal was bound to fail. Accordingly, this factor weighed heavily against

allowing an extension of time to file the notice of appeal. The General Division refused to extend the time limit effectively ending the appeal process.

[12] The question is whether the General Division erred in any way by refusing to extend the time limit. For the following reasons, the Appeal Division finds that it did not.

[13] It is not in dispute that the Notice of Appeal was completed well after the 90-day time limit had expired. An appeal is not complete until the Tribunal has received all of the information required by section 24 of the *Social Security Tribunal Regulations, SOR/2013-60.*

[14] At every step of the process, the Tribunal advised the Applicant of the deficiencies in her Notice of appeal and provided her with the relevant information as to what she should do in order to complete the appeal process. The Applicant's main argument appears to be that no employee of the Government of Canada advised her that she could apply for a disability benefit. Having made an application for and having received disability benefits in 1992 and 1996, (GD7-8) the Appeal Division finds that it is reasonable to conclude that the Applicant had knowledge of the CPP disability programme. The Appeal Division finds that any failure of an employee of the Government of Canada to advise the Applicant about her eligibility for a CPP disability benefit cannot translate to a failure on the part of the General Division to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. Thus, the Applicant's submission in this regard is not a basis for the granting of leave to appeal.

[15] With respect to any possible error of law, the Appeal Division finds that the General Division both cited the appropriate law regarding extension of time limits and applied it correctly to the facts of the Applicant's case. The *Gattellaro* test does not require that all four factors be present, or be in an applicant's favour or be weighted equally, *Lavin v. Canada (Attorney General)* 2011 FC 1387. In the Applicant's case, the General Division found that the only factor that was not in her favour was the lack of an arguable case. This finding was fundamental to any possible decision, so much so that the General Division cannot be found in error when it decided not to extend the time limit for filing the Notice of appeal.

[16] Furthermore, the Appeal Division finds that the General Division did not misapprehend or disregard the facts of the Applicant's case. In explaining the delay, the Applicant stated that at

time, she was suffering the effects of breast cancer; and depression. The General Division found that this pertained to her situation in 1989 (para.15) but accepted that she had been making attempts to complete the Notice of appeal. The Appeal Division is satisfied that the General Division did not err in this regard.

CONCLUSION

[17] In light of the above discussion, the Appeal Division finds that the Applicant has not raised grounds of appeal that would have a reasonable chance of success.

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

Hazelyn Ross
Member, Appeal Division