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

Citation: *Minister of Employment and Social Development v. S. D,* 2016 SSTADIS 226

Tribunal File Number: AD-16-239

BETWEEN:

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

Applicant

and

S. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: June 21, 2016

Canada

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), grants the Applicant's request to extend the time limit for filing the application for leave.

[2] The Appeal Division of the Tribunal grants leave to appeal.

INTRODUCTION

[3] On January 25, 2016 the Tribunal received the Applicant's request for leave to appeal from the Applicant (the Application). The Applicant is seeking to appeal the decision of the General Division of the Tribunal issued on October 26, 2015 in which the General Division granted an extension of the time limit for filing the Respondent's appeal. The extension of time was granted in relation the Respondent's application for a disability pension under the *Canada Pension Plan*, (CPP), made in January 2011.

[4] The facts of the history before the Tribunal are clearly set out at paragraphs 11 through 14 of the Applicant's notice of appeal. Succinctly, they are:

The Respondent made several applications for a CPP disability pension: December 2006; (GD4- 64); January 31, 2011; March 14, 2011 (which per GD4-36 appears to have duplicated the January application); November 13, 2012. The current proceedings stem from her January 2011 application.

1) The Applicant denied this application and upheld its decision on reconsideration. The reconsideration letter is dated February 29, 2012.

2) The Respondent appealed the reconsideration decision to the General Division. The Tribunal received the Notice of Appeal on May 9, 2013, fourteen months after the date the reconsideration decision was communicated to the Respondent. The Notice of Appeal was incomplete.

3) On June 28, 2013, the Tribunal advised the Respondent that her notice of appeal was incomplete. It asked her to send the missing information no later than October 7, 2013. The Tribunal also asked the Respondent to ask for an extension of time to file the appeal.

4) On August 6, 2013, the Respondent provided the missing information, but did not make a request to extend the time for filing the notice of appeal.

5) On October 26, 2015, the General Division issued its decision granting the Respondent an extension of time to file her appeal. It did not ask the Applicant for submissions.

GROUNDS OF THE APPEAL

[5] The Applicant seeks leave to appeal on the basis that the General Division erred in law; in fact and law; as well as acted beyond its jurisdiction and breached natural justice when it allowed the Respondent's appeal extending the time limit in which the Respondent could appeal to it. (AD1-5)

[6] Counsel for the Applicant identified the following errors, which she states provide grounds of appeal that have a reasonable chance of success:

i. The General Division erred in law when considering the Respondent's extension of time request by determining that ss. 52(2) of the DESD Act did not apply in the circumstances (ss. 58(1)(b) of the DESD Act)*;*

ii. The General Division acted beyond its jurisdiction by failing to apply ss. 52(2) of the DESD Act (ss. 58(1)(a) of the DESD Act)*;*

iii. The General Division breached natural justice or otherwise acted beyond its jurisdiction by failing to provide the Applicant with the opportunity to provide submissions on the extension of time request in the circumstances of the case (ss. 58(1)(a) of the DESD Act).

iv. The General Division erred in fact made in a perverse or capricious manner or without regard for the material before it when it allowed the Respondent's extension of time request and ignored evidence (ss. 58(l)(c) of the DESD Act).

ISSUE

[7] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE GOVERNING STATUTORY PROVISIONS

[8] 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."

[9] 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."

[10] 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.[1] 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.

[11] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:

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.

[12] *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 an applicant's reasons for appeal fall within any of the stated grounds of appeal

[13] 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.

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

SUBMISSIONS

[14] Counsel for the Applicant submits that the General Division erred because granting the extension contravened subsection 52(2) of the DESD Act.

PRELIMINARY ISSUES

A. The Appeal Division Endorsements to the Application

[15] On March 31, 2016 the Appeal Division, having received the application for leave to appeal, issued an endorsement prefaced by the statement "since Courts have recognised that interlocutory decisions cannot be appealed unless special, or most exceptional circumstances, have been established." The endorsement asked the parties to respond to the following questions by May 2, 2016:

a. Whether the decision of the General Division member, which granted the extension of time, constitutes an interlocutory decision?

b. Whether the decision of the General Division can be appealed to the Appeal Division at this time?

c. If parties consider that the General Division decision is an interlocutory decision that can be appealed at this time whether the Applicant must establish special or most exceptional circumstances and whether the Applicant has established these special or most exceptional circumstances?

[16] The Appeal Division also asked whether the Applicant's failure to submit the declaration required by section 40 of the *Social Security Tribunal Regulations* (SST Regulations) affect the validity of the appeal and can this failure be corrected after the expiry of the deadline to the appeal?

[17] The Respondent advised the Tribunal that she would make no further submission in relation to her appeal file.

[18] In response to the Appeal Division's endorsement, the Applicant submitted that the General Division's decision on the extension of time to appeal was a final decision and also that "special circumstances" existed to permit the appeal of the extension of time decision.

[19] The Appeal Division's endorsement raises questions that the Federal Court appears to have addressed in *Attorney General of Canada v. O'Keefe*, 2016 FC 503, a decision upon which the Applicant relies. (AD1B-1). In *O'Keefe*, the Federal Court asked and answered two questions, namely whether the judicial review was premature; and whether the SST-Appeal Division decision granting leave to appeal was reasonable? For the purposes of this leave application, the Appeal Division need only consider the first question.

[20] In answering the first question, the Federal Court applied a purposive and contextual analysis of the statutory scheme governing the Tribunal to find that the granting of leave was final as it was determinative and dispositive of the rights of the parties. The Federal Court found that the finality of the Appeal Division's decision on granting leave was codified in section 68 of the DESD Act, which provides that the "decision of the Tribunal on any application made under this Act is final and, except for judicial review under the Federal Courts Act, is not subject to appeal or to review by any Court." The Federal Court went on to find at paragraph 26 of its decision that,

> [26] "The *DESDA* does not give statutory authority to the SST-Appeal Division to appeal or to review its own final and binding decisions regarding leave, nor is any other appeal mechanism provided. Upon granting or refusing leave, the SST- Appeal Division is *functus officio* with respect to their decision under section 58 of the *DESDA."*

[21] The Federal Court went on to find that the jurisdiction contained in the DESD Act could be distinguished from that of the former Pension Appeals Board and the line of cases developed under it that viewed leave decisions as interlocutory decisions. The Federal Court expressed the view that judicial intervention was warranted because, under the DESD Act, the test for obtaining leave and the nature of the appeal has changed; the appeal is not an appeal *de novo;* is limited to the three grounds of appeal under section 58 of the DESD; and the Appeal Division leave jurisdiction is "demarcated by those issues on appeal that have a reasonable chance of success." (at para. 28) Thus, the Federal Court concluded that despite concerns over judicial intervention in an administrative process or concerns over the judicious use of resources, judicial review was as equally applicable to Appeal Division decisions to grant leave as it was to decisions refusing leave.

[22] The Federal Court was clear in its intention that *O'Keefe* should serve as "guidance for future leave decisions"[2].

[23] The Appeal Division finds that given the discussion and decision in *O'Keefe,* until otherwise directed, the questions that had been posed in the Appeal Division's endorsement of March 31, 2016 are to be answered as follows:-

1. The decision of the General Division member, which granted the extension of time, is a final decision.

2. The decision of the General Division can be appealed to the Appeal Division at this time, as, pursuant to section 55 of the DESD Act, any decision of the General Division may be appealed to the Appeal Division by any person who is the subject of the decision, which includes the Applicant.

3. The decision not being an interlocutory decision, the question of exceptional circumstances does not arise.

B. The application to extend time

[24] The Appeal Division questioned whether the Applicant's failure to submit the declaration required by section 40 of the SST Regulations would affect the validity of the appeal and can this failure be corrected after the expiry of the deadline to the appeal. The declaration referred to requires an applicant to state that the information provided is true to the best of the applicant's knowledge.[3]

[25] The Applicant's counsel raised two points in this regard. First, she argued that it was not the Applicant's practice to include this declaration; this is the first time the issue has been raised. The Applicant should be treated in the same manner as any party, namely, that it should have been advised that the notice of appeal was incomplete and given an opportunity to remedy the default. Counsel for the Applicant also argued that the omission of the declaration did not invalidate the application for leave to appeal; in any event "special circumstances" as envisaged by section 3(1)(b) of the SST Regulations exist to extend the time and allow the Applicant to remedy the omission.

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[2] *O'Keefe, supra, para 234.*

[3] *Social Security Tribunal Regulations,* SOR/2013-60, section 40(1)(h).

[26] The General Division issued the decision in question on October 26, 2015. The Applicant filed the application for leave to appeal on January 25, 2016. (AD1-1). It is not in dispute that the Applicant did not file the declaration pursuant to section 40(1)(h) of the SST Regulations with its application for leave. The Appeal Division first addressed the Applicant's application on March 31, 2016, which is after the time for filing the application for leave had expired. The Appeal Division takes judicial notice of the fact that it is a practice of the Tribunal to advise applicants who file an incomplete application, whether for leave to appeal to the Appeal Division or a notice of appeal before the General Division, that their application is incomplete and to give them time to perfect the application while at the same time asking for an extension of time to file the application. In fact, as Counsel for the Applicant pointed out, this was done in the Respondent's case before the General Division.

[27] Having read the arguments of the Applicant and applying the test set out in *Canada (Minister of Human Resources Development) v. Gattellaro,* 2005 FC 883, the Appeal Division finds that this is an appropriate case in which to extend the time for filing the Application.

Intention to pursue the appeal

[28] Counsel for the Applicant submitted that the intention to pursue the appeal is demonstrated by the fact that the Applicant submitted the application for leave to appeal within the time limit for filing the application, namely on January 25, 2016. The Appeal Division agrees. But for the omission of the declaration, the Application is fulsome and nearly complete. The Appeal Division is satisfied that a continuing intention to pursue the appeal has been demonstrated.

Has the Applicant provided a Reasonable Explanation for the Delay?

[29] The Applicant's Counsel submitted that as it moved to respond to the Appeal Division's endorsement as well as to provide the missing declaration, it has provided a reasonable explanation for the delay. Correcting the omission is not, per se, an explanation. The explanation resides in the fact that the Applicant was addressing this situation for the first time. The Appeal Division finds that, in the circumstances of this case, the Applicant had provided a reasonable explanation for the delay.

Does the Applicant have an Arguable Case?

[30] Counsel for the Applicant argues that it has an arguable case. She states that the matter raises an issue of statutory interpretation of the one year statutory limitation on appeals to the Tribunal. (AD1A-16 at para. 43) According to the submission of the Applicant's counsel, this is a significant issue that may "determine whether or not an appeal exists in this case at the SST- GD and the application for leave raises valid and significant legal concerns with the SST-General Division's decision not to apply the statutory bar". Having read the Application and the basis for the appeal, the Appeal Division finds that the Applicant has raised an arguable case, namely, that the General Division may have committed an error of law when it allowed the extension of the time limit outside of the statutory one-year time limit.

What is the Prejudice to the Other Party?

[31] Counsel for the Applicant argues that the Respondent will suffer no prejudice if the extension is granted. Counsel submitted that all of the pertinent information needed to "process, file and for the Respondent to respond was contained in the Minister's Application for leave to appeal." The Appeal Division notes that the Respondent has filed no submissions in response to the Appeal Division's endorsement. Thus, she has put forward no argument concerning any possible prejudice, which is not to say that such prejudice might not arise from the grant of the extension. However, on considering the possible prejudice, mainly delay, to the Respondent, the Appeal Division is satisfied that any possible prejudice would be minimal. In fact, as the Applicant has already remedied the omission, the question of prejudice to the Respondent is now moot. (AD1A-204).

Is Granting an Extension to the Time Limit in the Interest of Justice?

[32] Counsel for the Applicant argued that allowing the extension of time would serve the best interest of justice as it would permit the Appeal Division to consider the application for leave to appeal in a situation where the application would impact other similar appeals. The Appeal Division concurs. In the view of the Appeal Division, the potential legal significance of the Application requires that the Applicant be granted an extension of time to file the declaration so that the substance of the Application could be addressed. Therefore, for all of the

above reasons, the Appeal Division grants the Applicant's request to extend the time limit for filing the application for leave to appeal.

ANALYSIS

[33] Turning now to the Application. The crux of the Applicant's argument is found in the following paragraph:

> [27] The one year time limit provided in section 52(2) of *DESDA* is absolute. In this case, the appeal was not brought within the statutory 90 day time limit. If an appeal is to be brought beyond the statutory 90 day time limit it cannot be brought without an extension of time. If the extension of time request is not made and not granted prior to the expiry of the one year limit provided in subsection 52(2) of *DESDA*, the appeal may not be brought.

[34] The Applicant argues that as the statutory one-year time limit expired on March 10, 2013 and as the Respondent neither requested nor was granted an extension of time prior to the expiry of the statutory one year limit, which the Applicant describes as "absolute", the General Division could not subsequently grant the Respondent an extension of time to file her notice of appeal. The Applicant makes the further point that until such time as the General Division grants an extension to file, the appeal cannot be filed, and there is no right to file an appeal. (para. 29, AD1-13)

[35] In analysing the Respondent's application to extend the time limit for filing her appeal, and in granting the extension of time to file the notice of appeal, the General Division found the following:

- that there was no evidence that the Respondent had taken any steps to pursue her appeal until she filed an incomplete notice of appeal on May 9, 2013;
- the Respondent failed to demonstrate that she formed the intention to pursue her appeal within the ninety-day time limit; or that she was reasonably diligent in pursuing her appeal up to the time her appeal was complete;
- that the Respondent had an arguable case on appeal;
- the Respondent had not provided a reasonable explanation for the delay; and
- given the relatively short period of time that had elapsed since the reconsideration decision the Minister (Applicant in this Application) did not appear to be prejudiced.

[36] More importantly, the General Division found earlier in its decision that the one-year statutory time limit now present in subsection 52(2) of the DESD Act did not apply to the Respondent because the statutory provision does not apply to those appellants who were notified of a reconsideration decision before April 1, 2013. The pertinent portions of the General Division decision are reproduced below:

> [3] When the Appellant was notified of the reconsideration decision, subsection 82(1) of the CPP was applicable and provided that an appeal of a reconsideration decision may be filed within 90 days of the date the appellant received it or within such longer period that the Commissioner of Review Tribunals may allow…The Tribunal finds that the one-year time-limit under subsection 52(2) of the DESD Act does not apply to those appellants who were notified of a reconsideration decision before April 1, 2013. In coming to this conclusion, the Tribunal has considered the rules of statutory interpretation, in particular, the general rule that legislation is not to be interpreted as having retrospective application. Consequently, the Tribunal concludes that subsection 52(2) of the DESD Act should be interpreted to apply only to appellants who received a reconsideration decision after April 1, 2013, which is not the case for the Appellant.

[37] While the question is quite simple, namely, if you received a reconsideration decision before April 1, 2013, are you bound by subsection 52(2) of the DESD Act; the resolution of this issue turns on statutory interpretation; the applicable rules of statutory interpretation and the construction to be given to subsection 52(2) of the DESD Act.

[38] Counsel for the Applicant argues that this is not a case where an appellant has pursued their appeal and filed the application to appeal the decision in time or had an outstanding extension of time request when the appeals process was changed, and then had their appeal denied solely on the basis of the one year statutory bar due to delays in having the matter heard. She distinguishes these circumstances from that of the Respondent who filed her appeal more than one-year after she received the reconsideration decision and after the coming into force of the DESD Act.

[39] The Appeal Division finds that Counsel for the Applicant has raised an arguable case as defined by *Hogervorst.* The Appeal Division finds that this is a sufficient basis on which to grant leave to appeal.

CONCLUSION

[40] Counsel for the Applicant submitted that the General Division made a number of errors, including an error of law when it determined that subsection 52(2) of the DESD Act did not apply in the circumstances*;* and exceeded its jurisdiction by failing to apply subsection 52(2) of the DESD Act; erred in fact made in a perverse or capricious manner or without regard for the material before it when it allowed the Respondent's extension of time request and ignored evidence (all of which are based on the same facts). Counsel for the Applicant also submitted that the General Division breached natural justice or otherwise acted beyond its jurisdiction by failing to provide the Applicant with the opportunity to provide submissions on the extension of time request in the circumstances of the case.

[41] The grounds of appeal being disjunctive, the Applicant need succeed on only one ground to permit leave to be granted. Having found that the Applicant has raised an arguable case with respect to whether or not the General Division committed an error of law when it decided that subsection 52(2) of the DESD Act did not apply to the Respondent, the Appeal Division finds there is no need to address the other grounds of the Application.

[42] The Application for Leave to appeal is granted.

[43] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Hazelyn Ross
Member, Appeal Division