



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. O. v. Minister of Employment and Social Development*, 2016 SSTADIS 316

Tribunal File Number: AD-15-980

BETWEEN:

**R. O.**

Applicant

and

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

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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LEAVE TO APPEAL DECISION BY: Hazelyn Ross

DATE OF DECISION: August 4, 2016

## **DECISION**

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

## **INTRODUCTION**

[2] This is the second time that the Appeal Division is considering the Applicant's application for leave to appeal the General Division decision that refused to extend the time for filing his notice of appeal of a reconsideration decision dated January 16, 2014. On September 30, 2015 a prior member of the Appeal Division had granted the Applicant leave to appeal; however, the Federal Court reversed this decision on May 4, 2016. The Federal Court remitted the matter back to the Appeal Division for redetermination. This is the redetermination of the application for leave to appeal.

## **PROCEDURAL HISTORY**

[3] The Applicant began to receive a partial *Canada Pension Plan*, (CPP), retirement pension in June 2012. (GD3-6) Afterward, he continued to work for several months. The Applicant worked for Rod's Auto Salvage Company as a seasonal worker between May 2012 and August 24, 2012 after which time he began to receive regular Employment Insurance benefits. The Applicant was hospitalised on November 13, 2012. Around this time he was diagnosed with congestive heart failure. (GD3-30) He applied for a CPP disability benefit on the basis of this medical condition. He argued that his congestive heart failure rendered him incapable regularly of pursuing any substantially gainful occupation.

[4] The Respondent denied his application and maintained the refusal on reconsideration. The Respondent reasoned that as a person who was in receipt of a retirement pension at the time he made the application for a disability pension, the Applicant could cancel the retirement pension only if he were found to have become disabled before the month in which his retirement pension became payable. (GD3-90)

[5] The Applicant attempted to appeal the reconsideration decision to the Tribunal. He filed a first, incomplete, notice of appeal. On September 10, 2014 the Tribunal advised the Applicant

that the notice of appeal was late and requested the missing information. When he perfected the notice of appeal, he did so well beyond the 90-day time limit established by the *Department of Employment and Social Development Act* (DESD). The Tribunal acknowledged receiving the complete notice of appeal by letter dated September 14, 2014. On October 30, 2014 the Tribunal received a letter from the Applicant that set out his reasons why he should be granted an extension of time in which to file the notice of appeal.

[6] On July 31, 2015, the General Division issued its decision denying the extension of time to file the appeal. The determinative factor in the General Division's decision was its finding that the Applicant did not have an arguable case.

### **GROUND OF THE APPEAL**

[7] The Applicant cited administrative delays and errors in the calculation of the CPP contribution record as reasons why he ought to be granted an extension in which to file the notice of appeal. He asserts that these errors and delays should not be allowed to cause him more stress and tension. He did not relate his appeal to any of the grounds of appeal contained in section 58 of the DESD Act.

### **ISSUE**

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

### **THE GOVERNING STATUTORY PROVISIONS**

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

[9] 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 by raising an arguable case in his application for leave.<sup>1</sup> An arguable case has been equated to a reasonable chance of success.<sup>2</sup>

[10] 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.

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

### **The test for granting an extension of time**

[12] Subsection 52(2) of the DESD Act gives jurisdiction to the General Division to extend the time for bringing an appeal.

- (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.

[13] The common law test was articulated in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833 and amplified in *(Canada) Attorney General v. Larkman* 2012 FCA 204 to include consideration of the interests of justice<sup>3</sup> In *Gattellaro*, the Federal Court set out the four criteria to consider and weigh in determining whether to extend the time period beyond the 90 days within which an applicant is required to file the application for leave to appeal. They are:

1. A continuing intention to pursue the application or appeal
2. The matter discloses an arguable case
3. There is a reasonable explanation for the delay, and
4. There is no prejudice to the other party in allowing the extension.

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

<sup>2</sup> *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

<sup>3</sup> *(Canada) Attorney General v. Larkman* 2012 FCA 204, when the Federal Court of Appeal stated that in considering whether to extend time, the “overriding concern is that the interests of justice be served”.

## SUBMISSIONS

[14] The Appellant's submissions were the same as he made before the General Division.

[15] The Respondent did not file submissions.

## ANALYSIS

[16] In its analysis, the General Division resolved three of the four *Gattellaro* factors in favour of the Applicant. The sole factor that the General Division did not resolve in his favour was that the matter disclosed an arguable case. The rationale of the General Division decision is found at paragraph 12 of its decision. The General Division stated:-

[12] The Tribunal finds that the Appellant's case does not have a reasonable chance of success. A person can qualify for a CPP retirement pension or a disability pension but can only receive one of the two pensions. A retirement pension can be cancelled in favour of a disability pension only if the recipient is deemed to be disabled before the month the retirement pension became payable. In this case, the Appellant would have had to have been disabled by May 2012. The Appellant worked after this date until August 2012. This shows that the Appellant had work capacity after he last qualified for a CPP disability pension. His doctor began treating his heart condition in November 2012. This shows that the condition that prevented him from working began after the Appellant started receiving his early retirement pension.

[17] The Appeal Division finds that this paragraph is an accurate statement of the law, subsection 42(2), and sections 44 and 66.1 of the CPP being the applicable legal provisions. Of particular relevance is section 66.1 which governs when a retirement pension could be cancelled in favour of a disability pension.

**66.1. Request to cancel benefit** – (1) A beneficiary may, in prescribed manner and within the prescribed time interval after payment of a benefit has commenced request cancellation of that benefit.

**(1.1) Exception** – subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an applicant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the applicant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable.

[18] Thus, as the General Division found, the Applicant had to be found to have become disabled, at least in the month prior to his receiving his retirement pension. In the Applicant's

case, this month is June 2012. It is not disputed that the Applicant was able to engage in substantially gainful occupation during the summer of 2012. Nor is it in dispute that this occupation was seasonal and when it ended the Applicant was able to benefit from regular Employment Insurance benefits. Receipt of Employment Insurance benefits has been held to indicate an ability to engage in any substantially gainful employment: *Gall v. MEI* (June 18, 1996) CP 3567. Although this decision is not a precedent, I find it persuasive. All of which points to the absence of any error on the part of the General Division as, in the view of the Appeal Division, congestive heart failure did not affect the Applicant's ability to pursue any substantially gainful occupation until well after his retirement pension had begun.

[19] Further support for this position is found in the Tribunal Record, which indicated that it was not until November 2012 that the Applicant's family physician began to treat him for congestive heart failure. (GD3-130) This date is well beyond the start date of his retirement pension. Accordingly, subsection 66.1(1.1) applies to exclude the Applicant from the operation of section 66.1, which provision would have allowed the cancellation of the retirement pension in favour of the disability pension, had he been deemed disabled in the month prior to receipt of his retirement pension. Thus, the General Division was correct in its interpretation of the statutory provision and was also correct in its application of the law to the Applicant's circumstances.

## **CONCLUSION**

[20] Leave to appeal is refused.

Hazelyn Ross  
Member, Appeal Division