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

Citation: *K. C. v. Minister of Employment and Social Development,* 2016 SSTADIS 347

Tribunal File Number: AD-16-558

BETWEEN:

K. C.

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

Leave to Appeal Decision by: Janet Lew

Date of Decision: September 7, 2016

Canada

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 9, 2016. The General Division refused to exercise its discretion in favour of extending the time for the Applicant to file a notice of appeal, as it found that he did not have a continuing intention to pursue an appeal with the General Division, he had failed to provide a reasonable explanation for the delay in filing an appeal and the Respondent would be unduly affected by an extension of time to appeal. The Applicant filed an incomplete application requesting leave to appeal with the Social Security Tribunal on April 13, 2016.

ISSUE

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

SUBMISSIONS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[4] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within the permitted grounds of appeal and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[5] On reconsideration, the Respondent denied the Applicant's application for a Canada Pension Plan disability pension in a letter dated May 8, 2007. The Applicant contends that the Respondent's reconsideration decision was not communicated to him until he requested a copy of the decision in March 2015. He filed an appeal on June 22, 2015, three weeks after receiving a copy of the reconsideration decision on June 1, 2015.

[6] In his application requesting leave to appeal, the Applicant submits that he has been unfairly treated in the process and that his appeal is valid.

[7] For the most part, the Applicant seeks a reassessment on the issue of whether an extension of time should be granted to file his appeal before the General Division. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence altogether. Rather, its role on an application for leave to appeal is to determine whether the General Division erred in law, made an erroneous finding of fact or failed to observe a principle of natural justice, as set out under subsection 58(1) of the DESDA.

[8] Given that the General Division found the appeal to have been filed several years after the reconsideration decision had been communicated to him, the General Division could have relied upon subsection 52(2) of the DESDA. The subsection stipulates that "in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant". In other words, the General Division could have readily dismissed the appeal altogether, without considering whether to grant an extension of time to file the appeal.

[9] The Applicant argues that the process has been unfair, as he was denied the opportunity to address the merits of his claim. However, there is no entitlement to a hearing of the appeal on its merits under the DESDA, where an applicant has been late in bringing an appeal. Under those circumstances, and where the appeal is brought within one year after the day on which the decision is communicated to an applicant, he must seek an extension of time to bring an appeal. This relief is discretionary, although the General Division must reasonably and properly exercise that discretion. After determining that the appeal was late, the General Division weighed and considered the four *Gattellaro* factors in making its decision. The General Division also referred to *Canada (Attorney General) v. Larkman,*

2012 FCA 204, where the Federal Court of Appeal held that the overriding consideration in determining whether to grant an extension is that the interests of justice be served.

[10] It is not apparent from the evidence before the General Division whether there were any other extenuating factors or considerations, which would have enabled the General Division to determine whether an extension would serve the interests of justice, apart from the Applicant's assertions that he had never received a copy of the Respondent's reconsideration decision until June 2015. In response to this, the General Division imposed a duty on the Applicant to make enquiries and follow up with the Respondent in a timely manner for the results of its reconsideration decision.

[11] It would have been more appropriate for the General Division to have focused on whether the reconsideration decision had been communicated to the Applicant and, if so, on what date. In this regard, the General Division determined that the reconsideration decision must have been communicated to the Applicant by no later than May 18, 2007, given that it took judicial notice of the fact that "mail in Canada is usually received within 10 days". It was not appropriate for the General Division to rely on its authority to take judicial notice of facts that are not generally and widely recognized. There are limits to the reach of judicial notice. Those limits are set out in *R. v. Find* (2001), SCC 32 (CanLII), 154 CCC) (3d) 97 (SCC) and *R. v. Spence* (2005), 2005 SCC 71 (CanLII), 202 CCC (3d) 1 (SCC). As McLachlin C.J. set out, at paragraph 48:

> … the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 1982 CanLII 1751 (ON CA), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[12] The presumption of mail delivery within 10 days is a reasonable one, but in this particular case, the Applicant has consistently denied ever being aware of the reconsideration decision. The Respondent's submissions to the General Division indicate that there were at least six separate instances of communications between the Applicant and the Respondent from March 2010 and March 19, 2015, but it is unclear what the nature of

those communications were and whether there was any indication to the Applicant that his application for a disability pension had been denied on reconsideration. It might have been of some assistance had the nature of those communications between March 2010 and March 19, 2015 been disclosed.

[13] This raises the question as to whether the presumption of mail delivery can be displaced and if so, under what circumstances. The General Division did not examine this issue. It would seem sufficient to displace the presumption, if an applicant denies that he has ever received notice of the reconsideration decision and there is no proof of service of the reconsideration decision on him, or any evidence that he might have otherwise received the reconsideration decision.

[14] Although it is generally reasonable to expect an applicant to make follow-up enquiries, the fact that the General Division imposed a duty on the Applicant - when one does not exist under the DESDA – raises an arguable case as to whether the doctrine of *laches* applies, particularly when a considerable delay is involved and the Respondent may suffer some prejudice. In other words, can the Respondent rely on the Applicant's delay as a basis to deny his appeal?

[15] The Supreme Court of Canada considered the doctrine of laches in *K.M. v. H.M.***,** 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6; 142 N.R. 321; 57 O.A.C. 321, La Forest, J., said, at pages 77 to 78 [S.C.R.]:

> . . . A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane**,** *supra*, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
> > 'It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb…
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under

> either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

CONCLUSION

[16] Given the considerations above, I am satisfied that the appeal has a reasonable chance of success. The application for leave to appeal is granted. The parties should argue the applicability of the doctrine of *laches* and whether there is any duty on an applicant to make timely enquiries on the status of any applications or reconsideration requests. The parties should also indicate their preferred form of hearing and provide time estimates. This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division