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

Citation: *T. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 365

Tribunal File Number: AD-16-389

BETWEEN:

T. M.

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: Hazelyn Ross

Date of Decision: September 16, 2016

REASONS AND DECISION

INTRODUCTION

[1] On November 19, 2015, the General Division of the *Social Security Tribunal of Canada*, (the Tribunal), determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, (CPP). On March 4, 2016, the Applicant filed an application for leave to appeal, (the Application), with the Appeal Division of the Tribunal.

[2] The General Division decision was issued on November 19, 2015. Since the Applicant failed to indicate when it was communicated, I find that the deemed date of communication is November 29, 2015, pursuant to paragraph 19(1)(a) of the *Social Security Tribunal Regulations*. The Application was due at the latest on February 29, 2016. The Application was received 4 days late.

ISSUE

[3] Two issues arise in regard to this Application. The Appeal Division must decide whether to extend the time for filing the Application. Should the Appeal Division decide to extend the time for filing the Application, it must then decide whether the appeal has a reasonable chance of success to determine if the leave to appeal should be granted.

THE LAW

[4] Section 52 of the *Department of Employment and Social Development Act*, (DESD Act), provides for appeals to the Tribunal's General Division. The section provides,

> **52.** ***Appeal - time limit*** **– (1)** An appeal of a decision (of the Minister) must be brought to the General Division in the prescribed form and manner and within,
> (a) in the case of a decision made under the *Employment Insurance Act*, 30days after the day on which it is communicated to the appellant; and
> (b) in any other the case, 90 days after the day on which it is communicated to the appellant.

[5] Subsection 52(2) of the DESD Act allows the General Division to extend the time within which an appeal may be brought, but limits such extensions to one year after the day on which

the decision is communicated to the appellant. Section 19 of the *Social Security Tribunal Regulations*[1] governs the deemed date of communication.

> **19.** *When decision deemed communicated* – **(1**) A decision made under subsection 52(1), 54(1) 58(3), 59(1) or 66(1) of the Act is deemed to have been communicated to a party,
> (a) if sent by ordinary mail, 10 days after the day on which it is mailed to the party:
> (b) if sent by registered mail or courier, on
> (i) The date recorded on the acknowledgement of receipt, or
> (ii) the date it is delivered to the last known address of the party; and
> (c) if sent by facsimile, email or other electronic means. the next business day after the day on which it is transmitted.
> **(2)** Other documents sent by Tribunal – Subsection (1) also applies to any other document sent by the Tribunal to a party.

[6] These deemed communication provisions apply to appeals to the General Division; General Division decisions; decisions of the Appeal Division on leave applications; Appeal Division decisions on appeals from the General Division. When the Tribunal received the Application it was some four (4) days past the time for filing, necessitating a decision on whether to extend the time limit.

[7] In regard to the Application, subsections 56(1) and 58(3) of the DESD Act require the Appeal Division to first grant leave to appeal: "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal." Subsection 58(2) provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[8] In order to obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[2] In *Canada (Attorney General) v. O'Keefe* 2016 FC 503, the Federal Court examined the jurisdiction of the Appeal Division to grant leave to appeal, stating that:-

> [36] Leave to appeal a decision of the SST-GD may be granted only where a claimant satisfies the SST-AD that their appeal has a "reasonable chance of success" on one of the three grounds of appeal identified in subsection 58(1) of the *DESDA*: (a) a breach of

[1] *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236.*
[2] 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."

natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. No other grounds of appeal may be considered (*Belo-Alves,* above, at paras 71-73).

[9] 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:[3] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. 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.

[10] *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.

Should the Appeal Division extend the time limit?

[11] The Appeal Division notes that the Applicant did not make a formal request to extend the time limit. However, while he did not do so, he did offer an explanation for the late filing. Given the minimal delay, the Appeal Division is of the view that it is appropriate to address the question without seeking submissions on the issue. In deciding whether or not to extend the time limit, the Appeal Division considered and applied the case law as set out in *Canada (Minister of Human Resources Development) v. Gattellaro* 2005 FC 883 and in *Canada (Attorney General) v. Larkman,* 2012 FCA 204.

[12] *Gattellaro* sets out a four–prong test to be applied to applications to extend time, while *Larkman* enjoins decision-makers to consider the best interest of justice in deciding whether or not to extend a time limit. In the instant case, the Appeal Division is of the view that the

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

Applicant has demonstrated a continuing intention to bring the application, in that he made it within four days of the expiry of the time limit. The Appeal Division is also satisfied that the delay being short does not occasion prejudice to the Respondent, as there could be no question of it being hampered in the preparation of its case. The Appeal Division is also satisfied that the Applicant has put forward a reasonable explanation for the delay. He stated that he had mailed his original application to the wrong address and it was returned to him. In the absence of contrary evidence, the Appeal Division accepts the Applicant's explanation for the delay. The only question lies with respect to whether or not his application discloses an arguable case.

[13] The Applicant submitted that the General Division failed to observe a principle of natural justice when it determined his appeal. He submits that he continues to experience problems and that the decision should have been different. This is not, in the Appeal Division's view, an arguable case. It is nothing more than an expression of the Applicant's disagreement with the outcome of his appeal. He has not shown how the General Division was biased against him or, otherwise failed to observe a principle of natural justice. Therefore, it is not possible for the Appeal Division to grant an extension of the time limit in his case. In the view of the Appeal Division, the interest of justice does not dictate that it grants an extension, notwithstanding that the delay was short.

[14] Even if the Appeal Division were to grant an extension to file the Application, it would still have to refuse the Application because as it has stated, the Applicant's submissions do not disclose a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[15] The Appeal Division refuses to extend the time for filing the appeal.

[16] The Application is refused.

Hazelyn Ross
Member, Appeal Division