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

Citation: *Minister of Employment and Social Development v. J. P.*, 2016 SSTADIS 509

Tribunal File Number: AD-16-501

BETWEEN:

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

Applicant

and

J. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision:: December 30, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 19, 2016.

[2] After considering the "G*attellaro"* factors and the interests of justice, the General Division had granted an extension of time for the Respondent to file an appeal. The Applicant filed an application requesting leave to appeal on March 29, 2016, and an amended application on April 12, 2016, invoking several grounds of appeal. The Respondent filed medical records on May 5, 2016, but otherwise did not address the issue of the extension of time.

ISSUE

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

ANALYSIS

[4] 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.

[5] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal

has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[6] The Applicant submits that the General Division exceeded its jurisdiction, erred in law and based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, in granting an extension of time to file an appeal.

[7] The Applicant argues that subsection 52(2) of the DESDA governs, such that the Respondent's appeal was statute-barred as she was late in filing an appeal. The subsection reads, "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".

[8] The Applicant argues that as the decision had been communicated to the Respondent on December 10, 2011 (which I am prepared to accept for the purposes of this application), the Respondent was late by the time she brought an appeal on March 2, 2015. The Applicant contends that the General Division did not have any authority to extend the time for filing an appeal after one year, and that the member acted beyond her authority by applying repealed legislative provisions to the Respondent's appeal.

[9] The Applicant claims that the General Division erred in law when it determined that subsection 52(2) of the DESDA did not apply in the circumstances, and that it should apply only to appellants who received a reconsideration decision on or after April 1, 2013. The Applicant maintains that the Respondent did not enjoy any vested right to an appeal: *Belo-Alves v. Canada (Attorney General),* 2014 FC 1100 at para. 78.

[10] Finally, the Applicant asserts that 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. The Applicant maintains that the General Division overlooked the fact that the Respondent's appeal was brought after the one year time limit in subsection 52(2) of the DESDA, and erred when it concluded that the Respondent had an arguable case, without considering when the request for an extension of time was made. The Applicant

argues that the General Division made a further erroneous finding in concluding that there was no prejudice "given the short period of time that has elapsed since the reconsideration decision", as three years is "not a short period of time".

[11] Although generally legislation is not to be interpreted as having retrospective application, the Respondent in this case had filed an appeal after April 1, 2013, by which time subsection 52(2) of the DESDA was in force and operation. Questions arise as to whether the statute-bar applies and if so, when it becomes operational, in circumstances when a decision was communicated to an appellant prior to April 1, 2013, and an appeal was filed well after one year of having had the decision communicated to her.

[12] I am satisfied that the appeal has a reasonable chance of success on the ground that the General Division may have erred in law and may have exceeded its jurisdiction in determining that subsection 52(2) of the DESDA did not apply in the circumstances, and in granting an extension of time to file an appeal.

CONCLUSION

[13] The application for leave to appeal is allowed.

[14] This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division