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

Citation: *K. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 137

Tribunal File Number: AD-16-1164

BETWEEN:

K. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time and Leave to Appeal by: Neil Nawaz

Date of Decision: April 4, 2017

REASONS AND DECISION

DECISION

Extension of time and leave to appeal are refused.

INTRODUCTION

[1] In a decision dated June 6, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a pension under the *Canada Pension Plan* (CPP) was not payable to the Applicant, because she did not have a severe and prolonged disability prior to the end of the minimum qualifying period (MQP), which ended on December 31, 2016.

[2] On September 28, 2016, beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA), the Applicant filed an incomplete application for leave to appeal with the Appeal Division of the Tribunal. Following a request for further information, the Applicant perfected her application for leave on October 25, 2016.

ISSUE

[3] I must decide whether an extension of time to file the application for leave to appeal should be granted.

THE LAW

Department of Employment and Social Development Act

[4] Pursuant to paragraph 57(1)(*b*) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. Under subsection 57(2), the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[5] The Appeal Division must consider and weigh the criteria as set out in case law. In *Canada v. Gattellaro,*[1] the Federal Court stated that the criteria are as follows:

(a) The applicant demonstrates a continuing intention to pursue the appeal;

(b) There is a reasonable explanation for the delay;

(c) There is no prejudice to the other party in allowing the extension; and

(d) The matter discloses an arguable case.

[6] The weight to be given to each of the *Gattellaro* factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served—*Canada v. Larkman.*[2]

[7] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[8] According to subsection 58(1) of the DESDA, the only grounds of appeal are 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 made in a perverse or capricious manner or without regard for the material before it.

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[9] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, an applicant does not have to prove the case.

[10] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success—*Canada v. Hogervorst*[3]; *Fancy v. Canada.*[4]

Canada Pension Plan

[11] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the MQP.

[12] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[13] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

APPLICANT'S SUBMISSIONS

[14] In her application for leave to appeal to the Appeal Division of September 28, 2016,[5] the Applicant advised that she was late in submitting her appeal because she had been under a

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

doctor's care for depression and anxiety. She stated that she had explained to the General Division that her employer attempted, at the prompting of her union, to place her in alternative positions. In the past year, she had tried two positions at the Royal Victoria Hospital but, because of anxiety, panic and depression, she had been unable to focus and had taken too much time off work. She felt like she was being penalized for her efforts, despite her poor health, to remain employed.

[15] In response to a request for further information from Tribunal staff, the Applicant submitted a letter on October 25, 2016, in which she reiterated and expanded upon her previous submissions. She maintained that the General Division had made an important error regarding facts. At the hearing, she tried her best to explain what had been happening at her place of work. She knew that she was failing and could not manage it. Her anxiety disorder generates filters of panic that impair her hearing, cloud her thinking and render her unable to express herself clearly.

[16] Because she is part of a union, her employer was obligated to consider her special needs and find her an accommodated position. In 2015, they put her into a temporary position in central registration but, for the first two weeks, she needed a friend to sit with her and help her cope with her panic attacks. Anxiety interfered with her digestive system, causing her to make frequent bathroom trips. It took six or seven months of training for her to master her job duties, but only with the help of a patient supervisor and supportive co-workers.

[17] She was informed that her position ended in March 2016 because of budget cuts, yet she knows that central registration has recently been hiring. She applied twice for a job there but was not called for an interview. She believes it was because her past performance was unsatisfactory.

[18] After her lay-off, she was given a permanent accommodated position in the cancer centre and was determined to do her best. She showed up every possible day she could, but she was consumed by anxiety, making it impossible to learn or even pay attention. Twice she had to leave work because of panic attacks. She could not cope with any social aspects of her job and

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[5] The Applicant completed the incorrect form; she should have used the form entitled "Application Requesting Leave to Appeal to the Appeal Division."

found it hard to make connections with people. Once again, she was deemed to have performance issues and was let go from this position after three months. The hospital did not offer her another position.

[19] The Applicant alleges that she was penalized for trying to work. The General Division based its dismissal of her appeal on her continuing employment, without recognizing the deleterious effect that this effort had on her health. The General Division judged her last positions as evidence that she was able to work, whereas the almost unbearable cost they imposed on her were proof of the opposite.

[20] The Applicant also commented on selected components of the General Division's decision, specifically its summaries of the oral and documentary evidence in paragraphs 19, 21, 25 and 33. She also qualified the General Division's characterization, in paragraphs 49 and 50 of its decision, of her earnings in 2015; while she agreed that she made a good income that year, she emphasized the singular circumstances of that job. It was a temporary, part-time position that came with a particularly benevolent boss, and she had not made that kind of income for the previous six years and would never do so again. The Applicant also took issue with paragraph 55, insisting that she had made incredible efforts to retrain and maintain employment, but had failed because of her health conditions.

ANALYSIS

[21] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that the Respondent received the Applicant's incomplete request for leave on September 28, 2016, and it was not perfected until October 25, 2016—150 days after the General Division's decision was mailed, and after the 90-day filing deadline set out in subsection 57(1) of the DESDA.

[22] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[23] Although the Applicant did not file a complete application for leave to appeal until two months after the statutory limitation, I am willing to assume that she had a continuing intention to pursue the appeal, since her first submission to the Appeal Division came shortly after the expiry of the filing deadline.

Reasonable Explanation for the Delay

[24] The Applicant said that her appeal was late because she had been under a doctor's care for depression and anxiety. Since her file documents a lengthy history of psychological illness and treatment, I am willing to give her the benefit of the doubt on this question and find that she had a reasonable explanation for the delay.

Prejudice to the Other Party

[25] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

Arguable Case

[26] It must be noted that much of the Applicant's submissions recapitulate evidence and arguments that, from what I can gather, were already presented to the General Division. Unfortunately, the Appeal Division has no mandate to re-hear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the grounds of appeal enumerated in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the decision of the General Division, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[27] That said, the Applicant did advance one ground that demands closer scrutiny. She alleges that the General Division erred in taking her temporary job as a patient service

registration clerk at the Royal Victoria Hospital, from June 2015 to March 2016, to be evidence of ongoing capacity, disregarding important extenuating factors, such as the toll it took on her mental health, despite it being a part-time accommodation position with an unusually benevolent supervisor.

[28] It is an established principle of administrative law that a tribunal is presumed to have considered all the evidence and need not refer to each and every item of evidence before it.[6] Nevertheless, I have reviewed the General Division's decision against the record but can find no indication that it ignored or misrepresented a significant aspect of the Applicant's evidence. In paragraph 14, the General Division duly noted that her job in central registration was temporary, part-time and subject to accommodation:

> [14] … As the Appellant was still a union employee of the hospital, they brought her back to work on June 15, 2015 as a patient service registration clerk, in a non-union position. She worked five hours a day, five days a week. The job was an accommodation position. Her manager knew she required accommodations and due to her anxiety was slow to learn at times. The manager trained her for five months until she was comfortable with the computer and the job. It was very fast paced working with people. She stated it was the best job of her life. In 2016 the hospital budget was cut and the accommodation jobs were cancelled.

[29] I have also listened to the audio recording of the hearing and heard nothing to indicate that the Applicant's testimony was negatively affected by anxiety or panic. She was afforded a full opportunity to give evidence as she saw fit, and it appears she took advantage of it, fluently and assertively describing her vocational and medical history and current status. If the Applicant neglected to mention that she required a friend to help her manage the challenges of her new job, the Appeal Division is not the forum to introduce that evidence. I would say the same for the Applicant's paragraph-by-paragraph commentary, which, for the most part, repeats submissions that were previously presented to the General Division.

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[6] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[30] The Applicant suggests that the General Division ignored evidence that the significant earnings she reported in 2015 were the result of a non-replicable, unique set of factors. However, the decision shows that the General Division weighed the evidence on this point and found that, more likely than not, her capacity to perform substantially gainful work was sustainable:

> [47] … the Appellant has managed to work at modified hours, albeit with a benevolent employer, from June 2015 until March 2016. She even stated it was the best job of her life. The Appellant was not dismissed from that job due to her work performance, or even due to her lack of attendance. It was due to downsizing, and she was offered another sedentary position.
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> [48] She has asked for accommodations in the new position and was denied, and it would appear she is not under the supervision of as accommodating and benevolent of a supervisor as she was in her previous position in 2015. While she is still in the early months of the new job, and admittedly not "up to speed", she is still currently employed.
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> [49] The Appellant is working part time, and making almost half what she made from June 2015 until March 2016, her current bi-weekly paycheque of $700.00 after tax, for 16 hours a week at $25.50 per hour. This would average an annual after tax salary of $18,200. The maximum annual amount a person could receive as a disability pension in 2016 is $15,489.72.

[31] The General Division concluded, with justification, that the temporary registration job was not a "one-off," nor was it a failed work trial; rather it was part of an ongoing demonstration of capacity that saw her engaged in substantially gainful employment—admittedly not without difficulty—right up until the hearing date and presumably beyond. I would not interfere with a finding of the General Division, where it has weighed the evidence and taken into account the submissions of both parties. As it has done so here, I see no arguable case on this ground.

CONCLUSION

[32] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. I accepted that the Applicant had a continuing intention to pursue her appeal and saw fit to assume that she had a reasonable explanation for the delay in filing her request for leave. I also thought it unlikely that the Respondent's interests would be prejudiced by extending time. However, I could find no

arguable case on appeal, and it was this last factor that was decisive; I see no point in advancing this application to a full appeal that is doomed to fail.

[33] In consideration of the *Gattellaro* factors and in the interests of justice, I would refuse an extension of time to appeal pursuant to subsection 57(2) of the DESDA.

Member, Appeal Division