



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 165

Tribunal File Number: AD-16-880

BETWEEN:

S. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: April 13, 2017

REASONS AND DECISION

[1] On February 25, 2014, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable to the Applicant. The Appeal Division refused leave to appeal that decision on April 27, 2015. Subsequently, on May 29, 2015, the Applicant filed an application to rescind or amend the 2014 General Division decision (with the General Division).

[2] On March 15, 2016, the General Division determined that the Applicant's application to rescind or amend was statute-barred on the basis that it had not been filed within the one-year limitation period. The Applicant now seeks leave to appeal this General Division decision.

Is this a Late Application?

[3] Pursuant to s. 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA), the application for leave to appeal to the Appeal Division must be made within "90 days after the day on which the decision is communicated to the appellant." Applicant's counsel filed the application requesting leave to appeal on June 29, 2016, and the Tribunal then advised that it appeared to be late. However, an internal Tribunal memorandum confirms that the General Division decision had been returned to the Tribunal and re-mailed, with an address correction, on March 30, 2016. Paragraph 19(1)(a) of the *Social Security Tribunal Regulations* states that decisions are deemed to have been communicated 10 days after the mailing date, and consequently the decision was deemed to have been communicated on April 9, 2016. Ninety days after that date was July 8, 2016. As such, I conclude that the application was filed on time.

[4] I turn, therefore, to the consideration of the Applicant's request for leave to appeal.

Leave to Appeal

[5] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the DESDA:

- 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.

[6] Pursuant to s. 56(1) of the DESDA, “An appeal to the Appeal Division may only be brought if leave to appeal is granted.” Subsection 58(2) of the DESDA provides that “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[7] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and appreciably lower hurdle to be met; the Applicant does not have to prove the case at the leave stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success, on at least one of the permissible grounds in s. 58(1) of the DESDA. This means having, at law, some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Appeal Division should not weigh the evidence at the leave stage, or dispose of the case on the merits; leave should be granted unless the Appeal Division concludes that no one could reasonably believe in the appeal’s success: *Canada (Procureur général) c. Bernier*, 2017 CF 120.

[8] In his reasons for leave to appeal, Applicant’s counsel first submits that the General Division failed to observe a principle of natural justice, by failing to advise the Applicant that the limitation period was at issue. As outlined in the General Division decision, the member had adjourned an oral hearing and instead requested written submissions from the parties. Although she asked for submissions “with respect to section 66,” the member specifically quoted s. 66(1)(b) of the DESDA, with no reference to the time limit provision found in s.

66(2). In response, Applicant's counsel filed submissions on the question of whether new material facts had been presented that could not have been discovered at the time of the hearing, with the exercise of reasonable diligence (the test found in s. 66(1)(b)). As the General Division noted in its decision, Applicant's counsel did not address the limitation period found in s. 66(2), and the Respondent did not file submissions. No further hearing was held prior to a decision being issued.

[9] I am satisfied that an arguable case has been raised with respect to a possible breach of natural justice, in relation to the General Division's framing of the issue and its potential impact on the Applicant's right to be heard on a decisive issue.

[10] Having found that there is an arguable case on one ground of appeal, I need not consider any other grounds that the Applicant has raised at this time. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be dismissed: *Mette v. Canada (Attorney General)*, 2016 FCA 276. The Applicant is not precluded from advancing any of the grounds raised in his application for leave to appeal.

[11] I invite the parties to include in their submissions the relevant jurisprudence on a tribunal's obligation (if any) to give notice of the issues under consideration, the scope of the "special circumstances doctrine," the availability of equitable relief at an administrative tribunal, and the application of s. 66(2) of the DESDA in circumstances similar to this appeal.

CONCLUSION

[12] The application for leave to appeal is granted.

[13] This decision does not presume the result of the appeal on the merits of the case.

Shirley Netten
Member, Appeal Division