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

Citation: *G. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 282

Tribunal File Number: AD-16-571

BETWEEN:

**G. L.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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Leave to Appeal Decision by: Meredith Porter

Date of Decision: June 16, 2017

Canada

## REASONS AND DECISION

## INTRODUCTION

[1] On January 28, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Respondent's decision to refuse the Applicant's late reconsideration request was a discretionary one that was made both judicially and judiciously. The Applicant filed an application for leave to appeal the General Division's decision with the Tribunal's Appeal Division on April 15, 2016.

## THE LAW

[2] Subsection 81(1) of the *Canada Pension Plan* (CPP) states that an individual who is dissatisfied with a reconsideration decision may appeal that decision to the Minister within 90 days of receiving the decision or "within such longer period as the Minister may either before or after the expiration of those ninety days allow."

[3] Subsection 74.1(3) of the *Canada Pension Plan Regulations* (CPPR) states that the Minister may allow a longer period to make a request for reconsideration if it is satisfied that:

i. there is a reasonable explanation for requesting a longer period; and

ii. the applicant has demonstrated a continuing intention to request a reconsideration.

Where the request for reconsideration is made after the 365-day period after the day on which the applicant is notified in writing of the decision, subsection 74.1(4) of the CPPR provides that the Minister must also be satisfied that:

iii. the request for reconsideration has a reasonable chance of success; and

iv. no prejudice would be caused to the Minister or another party by allowing a longer period to make the request.

## SUBMISSIONS

[4] The Applicant submits that:

i. The General Division erred in law in concluding that all four factors enumerated in subsections 74.1(3) and (4) must be firmly resolved in favour of the Applicant.

ii. The General Division made an erroneous finding of fact in relying on the Respondent's incomplete call log.

iii. The General Division failed to observe a principle of natural justice in assessing the Applicant's credibility without giving the Applicant an opportunity to provide oral testimony at a hearing.

iv. The General Division erred in law in failing to consider that the Respondent made incorrect statements to the Applicant regarding the appeal process, and then penalized the Applicant for relying on those statements in good faith.

## ANALYSIS

[5] The Applicant filed his request for reconsideration of the Respondent's decision beyond 365 days after the decision was communicated to him. The Respondent refused to extend the time for the Applicant to file his request. In its decision, the General Division found that the decision whether to extend the time for filing a late reconsideration request is a discretionary one. The General Division noted that the Respondent had a duty to exercise its discretion "judicially and judiciously" (*Canada (Attorney General) v. Uppal*, 2008 FCA 388). It found that the Respondent had done so in the Applicant's case.

[6] The Applicant argues that the General Division failed to apply the correct legal test in determining that the Respondent acted both judicially and judiciously. In its decision, the General Division cited *Canada (Attorney General) v. Purcell*, [1996] 1 FCR 644, 1995 CanLII 3558 (FCA), at paragraph 25, as an authority in determining whether discretion had been exercised judicially. According to *Purcell*, one must ask whether the decision maker:

- acted in bad faith;

- acted for an improper purpose or motive;
- took into account an irrelevant factor;
- ignored a relevant factor; or
- acted in a discriminatory manner.

[7] The General Division notes that the issue to be determined was not whether the Respondent correctly determined the extension of time issue, but rather whether the manner in which the Respondent exercised its discretion demonstrated "good faith."

[8] In *Purcell*, the Federal Court, in citing *Canada (Attorney General) v. Smith* (1994), 167 N.R. 105 (F.C.A.), was clear that a decision-maker must act in good faith when exercising discretionary power and that discretionary decisions are reviewable only where the decision-maker has acted in bad faith, erred in law or relied on a misapprehension of the facts:

> "I take that term to mean that if it can be established that the decision-maker acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner, then any decision which flows from the exercise of a discretionary power will be set aside".

[9] The General Division proceeded to apply the *Purcell* criteria to the Applicant's case. In reviewing the entire record, the General Division could find no basis to conclude that the Respondent had acted in bad faith, acted for an improper purpose or motive, or discriminated against the Applicant in any way. However, much of the analysis in the General Division's decision considers whether the Respondent took into account an irrelevant factor or ignored a relevant factor.

[10] In arguing that the Respondent failed to act judicially and judiciously, the Applicant relies on the Federal Court of Appeal decision in *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, which cited *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.), at paragraph 33:

> [32] There is no dispute as to what the correct legal test is on a motion for an extension of time to file an application for leave to appeal […]. What is required is that
>
> a) there was and is a continuing intention on the part of the party presenting the motion to pursue the appeal;
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> b) the subject matter of the appeal discloses an arguable case;
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> c) there is a reasonable explanation for the defaulting party's delay;
>
> and
>
> d) there is no prejudice to the other party in allowing the extension.
>
> [33] This test is not in contradiction with the statement of this Court made more than twenty (20) years ago in *Grewal, supra* that the underlying consideration in an application to extend time is to ensure that justice is done between the parties. The above stated four-pronged test is a means of ensuring the fulfillment of the underlying consideration. It ensues that an extension of time can still be granted even if one of the criteria is not satisfied.

[11] The Applicant argues that both the Respondent and the General Division failed to consider that not all of the four factors enumerated in subsections 74.1(3) and (4) need to be resolved in the Applicant's favour. The proper legal test, as put forward by the Applicant, in accordance with case law is that the four factors should be "balanced" to ensure that the interests of justice are properly served. The Applicant relies on the Federal Court of Appeal's reasoning in *Larkman v. Canada (Attorney General)*, 2014 FCA 299, arguing that the paramount concern, when determining whether an extension of time should be granted, is that the interests of justice be served. I note that *Larkman* applies to late appeals where criteria for deciding whether an extension of time ought to be granted are not statutorily set out. In this case, the criteria the Respondent was required to consider are set out in the CPPR.

[12] My interpretation of subsections 74.1(3) and (4) is that the four factors must be met in order for the Respondent to extend the period for requesting a reconsideration decision based on the language of the respective provisions. Subsection 74.1 (3) reads, in part:

> "[…] the Minister may allow a longer period to make a request for reconsideration of a decision or determination if the Minister is satisfied that there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request a reconsideration." [my emphasis added]

Subsection 74.1 (4) reads in a similar way:

> "The Minister must also be satisfied that the request for reconsideration has a reasonable chance of success, and that no prejudice would be caused to the Minister […]" [my emphasis]

[13] Both subsections require that the Minister be satisfied that the criteria articulated in each of the subsections have been fulfilled, and I note that between each of the two criteria in 74.1(3) and between the two criteria in 74.1(4), the word "and" has been included. This directs to the Respondent that each one of the criteria must necessarily be considered and that the Minister must be satisfied that each of the criteria is sufficiently met. There is no suggestion that these four criteria should be "balanced" by the Minister in determining whether or not to grant an extension of time.

[14] The General Division turned its mind to whether the Respondent ignored relevant factors in exercising its discretion. The Respondent was required to contemplate each of the four criteria set out in subsections 74.1(3) and (4). The General Division found that the Respondent had properly considered each of the four factors. At paragraph 30 of 'its decision, the General Division notes that the Applicant's explanation for submitting a late appeal was that he was waiting for a Workers' Compensation Board (WCB) appeal to be resolved. To submit an appeal to the Respondent prior to the resolution of the WCB appeal was, in the Applicant's opinion, premature. The Applicant alleged that he had told a representative for the Respondent this over the phone and was told to submit his appeal once the WCB appeal was resolved. This explanation is at odds with the Respondent's Decision Document, which simply indicates that the Applicant was notified of the appeal process and the 90-day time limit to request an appeal. The Respondent considered the Applicant's explanation but did not find it reasonable or persuasive.

[15] The General Division concurred with the Respondent that there had not been evidence of a continuing intention to request a reconsideration decision. This finding was based on the history contained in the Respondent's Decision Document and submissions that the Respondent had filed in 2015 before an adjudicator. At paragraph 32 of its decision, the General Division notes that the Respondent's Decision Document contains discrepancies and parses through each of the discrepancies reaching a logical conclusion. The General Division was satisfied that the Respondent had considered the Applicant's continuing intention to appeal and had provided reasons for its determination that no continuing intention had been demonstrated.

[16] The General Division acknowledged that the Respondent had considered whether the Applicant's request for reconsideration had a reasonable chance of success, and determined that a reasonable chance of success may exist.

[17] Finally, the General Division found that the Respondent had not sufficiently explained how the Respondent would be prejudiced if an extension to request a reconsideration was granted.

[18] I have already outlined the Applicant's argument, in paragraph 11 above, that in assessing the factors contained in the CPPR and in exercising discretion, the issue of ensuring that the interests of justice be served was not necessarily considered by the Respondent, or by the General Division in determining whether the Respondent had exercised its discretion judiciously.

[19] The General Division was not required to assess the merit of the Respondent's discretionary decision. The issues before the General Division were whether the Respondent had exercised its discretion judicially and judiciously, whether the Respondent had considered each of the four criteria set out in subsections 74.1(3) and (4) of the CPPR in reaching a decision and whether the Respondent had provided reasons for how a decision was reached.

[20] I cannot find that the interests of justice ought to have been a factor considered by the Respondent, or by the General Division. Whether the interests of justice are served is not one of the criteria set out in the CPPR. The principle that the interests of justice are the paramount consideration in deciding whether an extension ought to be granted is found in case law. There

is no such principle stated in the statutory provisions that apply to the Respondent's decision as to whether an extension for requesting reconsideration should be granted.

[21] I find that the Applicant's contention that the General Division erred in law does not have a reasonable chance of success. I am not able to grant leave to appeal on this ground.

[22] The Applicant has made several other submissions, including: the General Division made an erroneous finding of fact in relying on the Respondent's incomplete call log; the General Division failed to observe a principle of natural justice in assessing the Applicant's credibility without providing the Applicant the opportunity to provide oral testimony at a hearing; and the General Division erred in law in failing to consider that the Respondent made incorrect statements to the Applicant regarding the appeal process, and then penalized the Applicant for relying on those statements in good faith.

[23] The above submissions extend beyond the Tribunal's jurisdiction in this case. The Tribunal's role is not to determine whether the Respondent made the correct decision, but whether the discretion that is afforded to the Respondent in the CPPR statute is exercised judicially. This authority does not extend beyond consideration of the *Purcell* criteria set out in paragraph 6 above. The only issue before the General Division was an assessment of the manner in which the discretion was exercised by the Respondent in light of the *Purcell* criteria.

[24] I note, that in addition to the General Division being limited with respect to the scope of its consideration of the Respondent's decision, the grounds for which the Appeal Division may grant leave to appeal do not include reconsidering evidence. The Appeal Division does not have broad discretion in deciding leave pursuant to the DESD Act. It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave on grounds not included in subsection 58 of the DESD Act (see *Canada (Attorney General) v. O'keefe*, 2016 FC 503).

[25] The Appeal Division is also unable to grant leave to appeal based on a reassessment of whether the Respondent's discretionary decision was the correct one.

## CONCLUSION

[26] The application for leave to appeal is refused.

Meredith Porter
Member, Appeal Division