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

Citation: *Minister of Employment and Social Development v. P. F.,* 2017 SSTADIS 321

Tribunal File Number: AD-16-1042

BETWEEN:

Minister of Employment and Social Development

Applicant

and

P. F.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: July 7, 2017

Canada

REASONS AND DECISION

[1] In an endorsement conveyed to the parties by letter dated March 7, 2016, a member of the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Respondent had filed his appeal to the General Division within the applicable time limits. The Applicant seeks leave to appeal that decision.

[2] Because the application for leave to appeal was made after the 90-day deadline stipulated in s. 57(1)(*b*) of the *Department of Employment and Social Development Act* ("DESDA"), the Applicant has applied for an extension of time to file the within application.

[3] For the reasons that follow, I grant the extension of time to file this application and also grant leave to appeal.

BACKGROUND

[4] The Respondent first applied for disability benefits on May 6, 2010. His application was refused initially and on reconsideration. The reconsideration decision (GD1-4 to GD1-5) was dated July 27, 2011. In the decision, the Respondent was informed that his application for disability benefits was refused based on the conclusion that, although he may have been unable to do his usual work, he should still have been able to do some type of work. The reconsideration decision also advised the Respondent:

> **If you disagree with our decision**
>
> You have the right to appeal this decision to the Office of the Commissioner of Review Tribunals. If you decide to appeal, you must write to them within 90 days of the date you receive this letter. [bold text in original]

[5] The Respondent wrote to Service Canada just short of two years later, on July 22, 2013 (GD1-2), stating:

> Please find enclosed my completed application for CPP Disability Benefits. This application is essentially identical to my previous application submitted in May 2010. The original application was denied initially and upon reconsideration. The appeal period for that reconsideration has expired. My

> insurer (RBC Life Insurance Company) is now requesting that I pursue my application through to the appeal process.
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> Please advise if Service Canada will permit the original reconsideration to be appealed or if it will accept this claim a second time for consideration. [underlining added]

[6] The second application for disability benefits (date-stamped July 28, 2013, GD5-15 to GD5-18) has presumably been treated by Service Canada as a separate disability benefits application. Service Canada forwarded the July 22, 2013, letter to the Tribunal by fax on October 7, 2013, where it was date-stamped as received on October 8, 2013 (GD1-1).

[7] On April 28, 2014, the Respondent wrote to the Tribunal (GD2-2) to say:

> I have recently been advised by your office that my application for CPP Disability Pension (Service Canada client number [omitted]) has been forwarded to the General Division of the Tribunal by Service Canada and that you intend to reject the claim on that basis that it is out of time. Your office has further advised that I should request that my application with you be withdrawn and that I should start the process for the third time with Service Canada.
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> Rather than immediately requesting the file be withdrawn, I am requesting an extension of time for filing the appeal pursuant to section 25 of Social Security Tribunal Regulations (SOR/2013-60). This is requested in the interests of saving government resources: if I were required to file the same materials again with Service Canada, their initial decision and their appeal should be the identical to what has already been issued. That would be a needless duplication.
>
> If the Tribunal decides to not grant the extension of time to file the appeal, this letter may then be treated as my request to withdraw the appeal to the General Division of the Social Security Tribunal.

[8] Some 11 months later, on March 26, 2015, Tribunal staff notified the Respondent that his Notice of Appeal to the General Division was incomplete and "[s]ince the Tribunal did not receive the information needed to complete an appeal, the Tribunal has closed its file […]." (GD4-3)

[9] The Respondent faxed a letter to the Tribunal on April 9, 2015, in which he stated he was not aware of any outstanding request for information regarding his appeal. He provided his phone number and asked for a phone call "at your earliest convenience." (GD4-2)

[10] On April 20, 2015, Tribunal staff wrote to the Respondent to advise him that, although some information had been received, the Notice of Appeal to the General Division remained incomplete and the file remained closed.

[11] On July 10, 2015, the Respondent wrote to state: “Further to the telephone conversation with your office on July 9, 2015, I confirm your advice that my appeal should not have been dismissed but that information is outstanding. You have now advised that you require two items from me: (1) my telephone number; and (2) a declaration that the information provide [*sic*] is true.” The Respondent supplied both items in this letter. (GD1A-1)

[12] On December 22, 2015, Tribunal staff wrote to the Respondent and stated the Tribunal had received his complete Notice of Appeal, in effect confirming that the appeal had been perfected when the Respondent supplied the missing information on July 10, 2015. The Tribunal also advised that because the appeal had been filed more than 90 days after the date the reconsideration decision had been communicated to him, he should provide a written explanation for the delay.

[13] On January 21, 2016, the Respondent wrote to the Tribunal to provide his submissions in support of his request for an extension of time to file his appeal. The Respondent stated: “This appeal was not filed more than 90 days after the reconsideration decision was communicated to me. I did not learn that the reconsideration had been rendered until April 2014.” (GD6-2) I note that this last sentence is contrary to statements made in his July 22, 2013, letter to Service Canada from which it is apparent he knew about the reconsideration decision before April 2014.

[14] The General Division’s decision on the request for an extension of time was sent to the parties as an endorsement contained in a letter from Tribunal staff dated March 7, 2016, which stated:

> Following the letter sent to you on December 22, 2015, a Member of the Social Security Tribunal of Canada has reviewed your Notice of Appeal and determined that it **was** filed within the applicable time limits for the following reasons:

> The Tribunal was able to determine that the Appellant [i.e. the Respondent on this application] submitted a letter to Service Canada dated July 22, 2013 requesting an appeal. This letter was sent to the Social Security Tribunal on October 7, 2013. The Appellant's phone number was missing from the file and this information was not included in his file until April 22, 2014. Due to the fact that the appeal was over two years old the SST indicated to the Appellant that it was closing the file. The Appellant requested an extension of time for filing the appeal pursuant to section 25 of the Social Security Tribunal Regulations. The Appellant had not had any communication from the Service Canada and when he phoned Service Canada in April 2014 he was told that the file had been forwarded to the SST. When he reached the Tribunal he was told that the SST did not have any of his documentation. It was at this time that Service Canada sent the file to the SST. It was the Appellant's belief that he had sent the appeal request inside of the 90 day time limit.
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> The Tribunal finds that there is clearly an issue with communications between the Appellant, Service Canada and the SST. It also finds that the Appellant had a clear intent to appeal the decision and to deny his appeal would breach the Appellant's right to natural justice. [bold text in original]

[15] The Applicant filed its application for leave to appeal on August 12, 2016.

REQUEST FOR AN EXTENSION OF TIME

[16] Because the within application for leave to appeal was filed more than 90 days after the date the General Division's decision was communicated to the Applicant, I must consider whether to grant an extension of time to file the application.

[17] The Applicant states in its materials that it received the General Division decision on March 7, 2016. (AD1-6, para. 1) Pursuant to s. 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 General Division decision is communicated to an applicant. The 90-day deadline fell on June 5, 2016, and, as this was a Sunday, it was due the following day, June 6, 2016: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 26. As the application was filed on August 12, 2016, it was filed 67 days outside the 90-day deadline.

[18] Subsection 57(2) of the DESDA gives me the discretion to allow further time, of no more than one year after the day on which a decision is communicated to an applicant, within which a leave to appeal application may be made.

[19] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court set out four factors that should be considered and weighed in determining whether to grant an extension of time:

a) Did the person requesting the extension demonstrate a continuing intention to pursue the application or appeal;

b) Does the matter disclose an arguable case;

c) Is there a reasonable explanation for the delay; and

d) Is there any prejudice to the responding party in allowing the extension.

[20] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204, the Federal Court of Appeal agreed that these four questions are relevant to its exercise of discretion to allow an extension of time. The Court observed at para. 62:

> These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice [citations omitted]. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay" [citations omitted]. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served.

[21] The Applicant states that the failure to apply for leave to appeal was due to an administrative error and "to the fact that it was simply inadvertently not actioned." The Applicant concedes this is not a reasonable explanation for the delay and I agree. With respect to having a continuing intention to appeal, the Applicant notes there was "no prior contact with the SST-GD or the SST-AD to show the Applicant intended to appeal the decision." The Applicant does not state in its materials that it had a continuing intention to appeal the decision. Given this, I am unable to find there was a continuing intention to appeal the decision. With respect to the prejudice caused to the Respondent by an extension of time, the extension sought is 67 days. The Applicant concedes there may be some prejudice to the Respondent. In the absence of any evidence on this issue, I am not in a position to make a finding whether there will be any prejudice to the Respondent by allowing an extension of 67 days.

[22] As explained in the next section, in my view, the Applicant has raised a number of arguments falling within the grounds listed under s. 58(1) of the DESDA that have a reasonable chance of success. For the purposes of determining whether to grant the extension of time, I give significant weight to the totality of the arguments that have a reasonable chance of success that have been put forward by the Applicant on the proposed appeal.

[23] Applying the *Gattellero* factors and bearing in mind the Federal Court of Appeal's *dicta* in *Larkman*, *supra*, that not all factors need be resolved in favour of the moving party and a strong case may counterbalance a less satisfactory justification for the delay, I am of the view that an extension of time must be granted to ensure that the interests of justice are served.

JURISDICTION OF THE APPEAL DIVISION

[24] The General Division's decision granting an extension of time to file the appeal is an interlocutory decision since the merits of the appeal of the reconsideration decision remain to be determined. See *Buck Bros. Ltd. v. Frontenac Builders Ltd.*, 19 OR (3d) 97, 1994 CanLII 2403 (ON CA).

[25] I am aware of at least one other decision where the Appeal Division has entertained an appeal of an interlocutory decision of the General Division: see *Minister of Employment and Social Development v. J.P.*, 2016 SSTADIS 509, which raised identical issues to those on this application.

[26] I am also aware that other members of the Appeal Division have determined that an application for leave to appeal an interlocutory decision of the General Division is premature, citing *Szczecka v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 934 (FCA): for example, see *A.N. v. Minister of Employment and Social Development*, 2015 SSTAD 280 at para. 21 and *W.F. v. Canada Employment Insurance Commission*, 2016 SSTAD 523. I respectfully part company with my fellow members, whose decisions are not binding on me, with respect to their determination of this issue.

[27] In *Szczecka*, the Federal Court of Appeal dismissed an application for judicial review of an interlocutory decision because the remedies available within the applicable administrative

framework had not been exhausted. The Federal Court of Appeal explained this principle in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, as follows:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: [citations omitted].
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted. [underlining added]

[28] My reading of *Powell*, *Szczecka* and other cases dealing with the same issue, is that the courts have held that recourse *to the courts* is to be made only after all remedies under the administrative process have been exhausted. These cases do not stand for the proposition that interlocutory decisions cannot be appealed *within* the administrative framework established by statute.

[29] Section 55 of the DESDA states: "*Any* decision of the General Division may be appealed to the Appeal Division by any person who is the subject of the decision […]" [my emphasis]. The Supreme Court of Canada has said that statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21- 22. Giving s. 55 of the DESDA a broad and generous interpretation, as befits its status as part of the benefits-conferring legislative scheme under the CPP, this section gives

the Appeal Division jurisdiction over appeals of both interlocutory and final decisions of the General Division.

[30] In *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257, at para. 44, the Federal Court of Appeal stated in *obiter* “while it is true that later tribunal panels are not bound by the decisions of earlier tribunal panels, it is equally true that later panels should not depart from the decisions of earlier panels unless there is a good reason”. Based on my reading of the relevant jurisprudence and my interpretation of s. 55, I have concluded that there is good reason to depart from the decisions of those earlier panels of the Appeal Division that have determined that appeal of an interlocutory decision of the General Division is premature.

[31] Given the recourse provided by s. 55 of the DESDA that “any” decision of the General Division may be appealed to the Appeal Division, I conclude the Appeal Division has jurisdiction to deal with this leave to appeal application and the appeal on the merits.

THE TEST FOR LEAVE TO APPEAL

[32] Pursuant to s. 58(1) of the DESDA, there are only three grounds to appeal a decision of the General Division: first, a breach of natural justice; second, an error in law; and third, an erroneous finding of fact made in a perverse and capricious manner or without regard to the material before it. The use of the word “only” in s. 58(1) means that no other grounds of appeal may be considered: *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at para. 72.

[33] An appeal to the Appeal Division may be brought only if leave to appeal is granted: DESDA, s. 56(1). The requirement to obtain leave to appeal to the Appeal Division serves the objective of eliminating appeals that have no reasonable chance of success: *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at para. 34, and leave to appeal will be granted only where an applicant demonstrates that the appeal has a reasonable chance of success on one or more of the grounds identified in s. 58(1) of the DESDA: *Belo-Alves*, *supra*, at paras. 70−73. In this context, having a reasonable chance of success means “having some arguable ground upon which the proposed appeal might succeed”: *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12.

[34] The issue before me on this application is whether the Applicant's appeal has a reasonable chance of success.

SUBMISSIONS

[35] With respect to an error falling within s. 58(1)(*a*) of the DESDA, the Applicant submits that the General Division breached the principles of natural justice by failing to provide it with the opportunity to make submissions on the extension of time request and in deciding there was no prejudice to the Applicant in granting the extension. The Applicant also argues that, given s. 52(2) of the DESDA, the General Division did not have jurisdiction to extend the time for filing the appeal more than one year after the Respondent received the decision.

[36] With respect to an error falling within s. 58(1)(*b*) of the DESDA, the Applicant submits that the General Division committed a number of errors of law. First, the Applicant argues that although the reconsideration decision was made under the former legal structure (i.e. before the coming into force of the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 ("JGLPA")), the DESDA applies to the appeal to the General Division because the DESDA was in force when the Respondent filed his appeal. Given this, s. 52(2) of the DESDA governs and the Respondent's appeal was statute-barred. Furthermore, the Applicant argues that because the Respondent did not pursue his appeal until well after the change in law brought about by the JGLPA and did not request an extension of time until more than two years had passed since the reconsideration decision was made, he had no vested right in the continued application of the repealed CPP provisions after April 1, 2013.

[37] The Applicant also submits that an extension is not a matter of right and the General Division was required to consider and weigh the factors identified in *Gattellaro*, *supra*, before deciding whether to exercise its discretion to extend the time within which the appeal was brought. The Applicant says that in failing to do so, the General Division committed an error of law which is reviewable under s. 58(1)(*b*) of the DESDA.

[38] Finally, the Applicant submits the General Division committed a reviewable error under s. 58(1)(*c*) of the DESDA by ignoring the evidence that the Respondent's appeal was brought after the one-year limit imposed by s. 52(2) of the DESDA.

ANALYSIS

[39] With respect to the allegation that the General Division may have breached a principle of natural justice by not seeking submissions from the Applicant before making a decision on the request to extend the time to file an appeal, the General Division file included a letter sent to the Applicant on December 22, 2015 (date-stamped as received by the Applicant the same day), enclosing a copy of the Notice of Appeal and asking the Applicant to provide to the Tribunal documentation relating to the reconsideration decision. (GD-5-1) The letter also stated:

> **Note**: This appeal is considered late, as it appears to have been filed beyond the timeframe provided by law. If you would like to provide submissions concerning the late appeal, please provide those submissions along with the documents requested under Section 26 (refer to item #21 below). [underlining added]

[40] In view of this correspondence, it is apparent that the Applicant was provided with the opportunity to provide submissions to the General Division concerning the late appeal. I find the proposed appeal has no reasonable chance of success on this ground.

[41] Nonetheless, I find the Applicant has raised other arguable grounds upon which the proposed appeal might reasonably succeed.

[42] First, the Respondent's appeal was not perfected until July 10, 2015, after April 1, 2013, when s. 52(2) of the DESDA came into force. There is an arguable case that s. 52(2) applied to the Respondent's appeal to the General Division. Subsection 52(2) of the DESDA states that *in no case* may an appeal be brought to the General Division more than one year after the reconsideration decision was communicated to the appellant. This raises the possibility that the General Division may have acted without jurisdiction when it granted the extension of time. I find this provides an arguable ground upon which the proposed appeal might succeed.

[43] Second, the General Division member's endorsement set out in Tribunal staff's letter of March 6, 2016, made no reference to s. 52(2) of the DESDA or the statutory regime applicable to the extension of time to bring an appeal. Nor was there any discussion or analysis regarding whether the extension of time was statute-barred in circumstances where the reconsideration decision was communicated to the Respondent prior to April 1, 2013, and the appeal was filed

well after one year had expired, on a date after the DESDA came into force. This failure to consider the impact of the statutory regime may constitute an error of law under s. 58(1)(*b*) of the DESDA. Furthermore, the member's reliance on findings that there was "an issue with communications between the Appellant, Service Canada and the SST" and that "the Appellant had a clear intent to appeal the decision" may constitute an error of law given the mandatory nature of s. 52(2), assuming it applies. These matters raise arguable grounds upon which the proposed appeal might succeed.

[44] Third, assuming that the one year limitation under s. 52(2) of the DESDA did not apply to the Respondent's appeal, it would nevertheless have been incumbent on the member to exercise properly his discretion to grant an extension of time beyond the 90 days specified in the CPP as it stood before the JGLPA came into effect. An improper exercise of discretion will occur if a decision is made without weighing the relevant factors. In the present case, the member appears to have given no consideration to the factors identified by the Federal Court of Appeal in *Gattellaro*, *supra*, to guide a decision-maker on whether to exercise discretion to grant an extension of time. The failure to consider and weigh these factors gives rise to a possible error of law under s. 58(1)(*b*) of the DESDA. I find this argument has a reasonable chance of success.

[45] Finally, the Applicant alleges that the General Division based its decision on an erroneous finding of fact without regard to the evidence that the appeal was brought after the one-year limit specified in s. 52(2) of the DESDA. Although the member stated it was the Respondent's belief that he had sent the appeal request within the 90-day time limit and the member appeared to rely on this in reaching his decision, the member did not advert to the fact that this statement, made in the Respondent's January 21, 2016, letter, contradicted statements made in his July 22, 2013, letter. Thus, the member's decision may have been based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before him, contrary to s. 58(1)(*c*) of the DESDA. I find this raises an arguable ground upon which the proposed appeal might succeed.

[46] Based on the above, I find the Applicant has raised a number of arguable grounds upon which the proposed appeal might succeed. I am satisfied that the appeal has a reasonable chance of success on one or more of the grounds set out in s. 58(1) of the DESDA.

DISPOSITION

[47] The extension of time to file the within application for leave to appeal is granted.

[48] The application for leave to appeal is granted. Success at the leave to appeal stage is not, of course, determinative of whether the appeal itself will succeed.

[49] In accordance with s. 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may (a) file submissions with the Appeal Division; or (b) file a notice with the Appeal Division stating that they have no submissions to file: SST Regulations, s. 42.

[50] The Applicant made submissions to request, in the event leave to appeal was granted, that the hearing of the appeal proceed by videoconference. The Respondent may wish to make submissions regarding the form the hearing of the appeal should take (e.g. teleconference, videoconference, in writing or in person) together with his submissions on the merits of the appeal.

Nancy Brooks
Member, Appeal Division