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

Citation: *Minister of Employment and Social Development v. L. B.,* 2017 SSTADIS 334

Tribunal File Number: AD-16-952

BETWEEN:

Minister of Employment and Social Development

Applicant

and

L. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: July 14, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated April 18, 2016, granting the Respondent an extension of time pursuant to subsection 52(2) of the *Department of Employment and Social Development Act* (DESD Act). The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on July 19, 2016.

ISSUE

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

THE LAW

[3] According to subsections 56(1) and 58(3) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] According to subsection 58(1) of the DESD Act, 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;
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> (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] Subsection 52(2) of the DESD Act 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."

[7] The prescribed form for bringing an appeal before the Tribunal is set out in section 24 of the *Social Security Tribunal Regulations* (*Regulations*):

> 24 (1) An appeal must be in the form set out by the Tribunal on its website and contain
>
> a) a copy of the decision that was made under subsection 81(2) or (3) of the *Canada Pension Plan*, subsection 27.1(2) of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;
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> b) the date the decision was communicated to the appellant;
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> c) if a person is authorized to represent the appellant, the person's name, address, telephone number and, if any, facsimile number and email address;
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> d) the grounds for the appeal;
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> e) any documents or submissions that the appellant relies on in their appeal;
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> f) an identifying number of the type specified by the Tribunal on its website for the purpose of the appeal;
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> g) the appellant's full name, address, telephone number and, if any, facsimile number and email address; and
>
> h) a declaration that the information provided is true to the best of the appellant's knowledge.

[8] Section 25 of the *Regulations* allows for an extension of time to bring an appeal under subsection 51(1) of the DESD Act, subject to the Applicant providing a statement that sets out the reasons for the requested extension of time. The one-year time limit set out in subsection 52(2) of the DESD Act is an unqualified time limit.

[9] Paragraph 3(1)(*b*) of the *Regulations* allows the Tribunal to vary the provisions and requirements of the *Regulations*, under "special circumstances," and reads as follows: The Tribunal "may, if there are special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision."

SUBMISSIONS

[10] The Applicant submits that the General Division acted beyond its jurisdiction in allowing an extension of time under subsection 52(2) of the DESD Act, as the Respondent did not submit an appeal or properly request an extension of time within the one-year time limit.

[11] The General Division acted beyond its jurisdiction by invoking section 24 of the *Regulations*, which allowed the Respondent to circumvent the one-year time limit as set out in subsection 52(2) of the DESD Act.

[12] The General Division erred in law by failing to invoke subsection 52(2) when considering the Respondent's request for an extension of time.

[13] The General Division based its decision on an erroneous finding of fact that it made without regard for the material and ignored the evidence in the record before it, in granting the Respondent's request for an extension of time.

ANALYSIS

[14] An application requesting leave to appeal must be granted before there is an active appeal before the Tribunal's Appeal Division. Granting leave to appeal is an initial and lower hurdle to be met. An applicant seeking leave to appeal does not have to prove the case at the leave to appeal stage but they must identify a reason for appeal that is permitted under subsection 58(1) of the DESD Act (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC)). The Applicant is required to establish that the appeal has a reasonable chance of success. This means having, at law, some arguable ground upon which the proposed appeal may succeed (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 (CanLII)).

[15] The Applicant has argued that the Respondent was erroneously granted an extension of time pursuant to subsection 52(2) of the DESD Act. Subsection 52(2) of the DESD Act requires that a request for an extension of time to the Tribunal's General Division be made within one year of the communication of the reconsideration decision, and that the request for an extension of time be made with a statement that sets out the reasons for the request.

[16] I have reviewed the record in its entirety and note that, after he had received the reconsideration decision on June 17, 2014, there was no communication from the Respondent until April 22, 2015. After filing the initial incomplete appeal, the following is a summary of the correspondence between the Tribunal and the Respondent as well as the documentation that the Respondent sent to the Tribunal:

a) The Tribunal received the incomplete appeal on April 22, 2015. An incomplete notice letter, dated May 4, 2015, was sent to the Respondent, and it included the following paragraphs:

> The Tribunal must receive a complete Notice of Appeal within 90 days after the day the Department of Employment and Social Development Canada's reconsideration decision was communicated to you. If the Tribunal receives a complete Notice of Appeal beyond the 90-day time limit, a Tribunal Member must decide if an extension of time should be granted before the appeal can proceed. **An extension cannot be granted if more than 1 year has passed since the reconsideration decision was communicated to you**. [my emphasis]
>
> If the Tribunal receives all of the missing information to complete your Notice of Appeal by June 4, 2015, the Tribunal will accept your complete Notice of Appeal as having been received on April 22, 2015.

b) No communication was received from the Respondent following this correspondence.

c) A second incomplete notice letter was sent to the Respondent dated September 11, 2015, and again, no communication was received from the Respondent.

d) An Authorization to Disclose was received by the Tribunal on September 9, 2015, indicating that the Respondent had secured the help of a representative.

e) The Tribunal logged a telephone conversation from the Respondent's representative on October 1, 2015, in which the representative was requesting an explanation of the incomplete Notice of Appeal letter dated September 11, 2015.

f) The Tribunal received a complete application on October 2, 2015, and an acknowledgment letter was sent to the parties on October 7, 2015.

[17] I have already set out the provisions and requirements found in the *Regulations* regarding requests for an extension of time to file an appeal with the Tribunal's General Division. The requirements include that, when requesting an extension of time beyond the 90-day time limit set out in subsection 52(1) of the DESD Act, a statement must be provided that sets out the reasons why an extension of time is necessary. In the record, I could not find any evidence of a request to extend the time, nor any statement from the Respondent explaining why the extension was necessary. I am bound to adhere to the provisions contained therein and a written explanation is required under subsection 52(1) of the DESD Act. As a result, I find that the Applicant has raised a ground of appeal that has a reasonable chance of success.

[18] I also recognize that the Respondent was sent a reminder letter dated September 11, 2015 requesting missing information which was required to complete the Notice of Appeal. This letter was sent to the Respondent well beyond the one year time limit to file an appeal. Administrative staff at the Tribunal may not be aware of the statutory requirements and time limits set out in the DESD Act but do take responsibility for providing updates and communicating the status of applicant's files to them. I am required to observe the provisions and requirements of the DESD Act, and although the Respondent was invited to file the missing information beyond the one year time limit by the Tribunal's administrative staff, I cannot consider this as a determinative factor in allowing the time limits of the DESD Act to be, essentially, side-stepped.

[19] The one-year time limit found in subsection 52(2) is an unqualified time limit. The General Division relied on paragraph 3(1)(*b*) of the *Regulations* to vary the provisions of section 24 of the *Regulations* and dispensed the Respondent from complying with that provision. The Applicant argues that the time limits, as set out in the DESD Act, are firm and should not be mechanically disregarded. The General Division deemed the application complete within the one-year timeframe, when, in actuality, it was not. Paragraph 3(1)(*b*) of the Regulations was relied on to dispense compliance with section 24. Ultimately, the requirements of subsection 52(1) of the DESD Act were circumvented or indirectly rendered inapplicable. The Applicant argues that the provisions of the DESD Act should not be disregarded, either directly or indirectly.

[20] The Applicant argues that the General Division erroneously granted an extension of time and that this is an error of law. I find that the Applicant has raised a ground of appeal that has a reasonable chance of success. Leave to appeal is granted on this ground.

[21] I find that the appeal has a reasonable chance of success. The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276 (CanLII), stated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. In *Mette*, Dawson J.A. stated that section 58 of the DESD Act "does not require that individual grounds of appeal be dismissed […] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." The other grounds of appeal that the Applicant has submitted and the analysis of whether the extension of time that the General Division has granted was an error are interrelated. As a result, I am not required to address the other grounds submitted in the application for leave to appeal that the Applicant has filed.

CONCLUSION

[22] The Application is granted.

[23] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[24] The parties are invited to file further submissions within the 45-day time frame allowed.

Meredith Porter
Member, Appeal Division