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

Citation: *S. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 344

Tribunal File Number: AD-16-864

BETWEEN:

S. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: July 19, 2017

Canada

REASONS AND DECISION

[1] In a decision rendered on April 5, 2016, a member of the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Respondent had exercised its discretion judicially when it refused the Applicant's late request for reconsideration of the Respondent's decision denying the application for a disability pension under the *Canada Pension Plan* ("CPP"). The Applicant seeks leave to appeal the General Division's decision.

BACKGROUND

[2] The Applicant applied for a CPP disability pension in March 2013. The Respondent denied the application by letter to the Applicant dated September 16, 2013 (the "Initial Decision") on the basis that, although the Applicant had limitations and restrictions that would prevent her from doing her usual work as a newspaper binder, her conditions did not prevent her from doing lighter work or part-time work more suited to her limitations. The Respondent advised the Applicant in the Initial Decision letter that she had 90 days from the date she received the letter within which to ask the Respondent to reconsider the Initial Decision.

[3] Counsel for the Applicant, Mr. Sarj Gosal, sent a letter to the Respondent on December 5, 2014 (the "December 2014 Letter") (GD2-7) requesting reconsideration of the Initial Decision, noting that he had originally sent a request for reconsideration to Service Canada on December 10, 2013 (the "December 2013 Letter"). He enclosed with the December 2014 Letter a copy of the December 2013 Letter, as well as a letter dated December 5, 2014, signed by the Applicant, requesting reconsideration of the Initial Decision (GD2-9) and enclosing an "Authorization and Consent to Representation" signed by the Applicant and Mr. Gosal.

[4] A medical adjudicator employed by the Respondent treated the December 2014 Letter as the Applicant's request for reconsideration. Using the date of the Respondent's receipt of the December 2014 Letter—December 15, 2014—as the date on which the reconsideration request had been made, the adjudicator calculated that the request was made 445 days following the "Established Date of Receipt of the Decision", which she deemed to be September 26, 2013, i.e. 10 days after the Initial Decision was issued.

[5] By letter dated January 6, 2016 (GD2-4 to GD2-5), the Respondent advised Mr. Gosal that the Applicant's request for reconsideration beyond the 90-day time limit was refused (the "Decision Refusing to Reconsider"). In the reasons provided, the adjudicator refused to proceed with the reconsideration on the grounds that (i) there was no reasonable explanation for the delay in making the request for reconsideration; (ii) there was no continuing intention to request reconsideration; (iii) because the Applicant had not submitted any new medical evidence, the reconsideration had no reasonable chance of success; and (iv) as none of the other three criteria had been met, granting the extension would be unfair to the Respondent (GD7).

[6] In the Decision Refusing to Reconsider, the adjudicator noted Mr. Gosal's claim that he had sent the December 2013 Letter and "original authorization" to request reconsideration of the Initial Decision on behalf of his client. She also noted that Mr. Gosal had provided copies of this letter and/or authorization in communications with the Respondent in the period following December 2013, but she determined that these were "invalid photocopies" and "not legal documents", because originals were required. The adjudicator reviewed the history of communications by Mr. Gosal's firm and the Respondent in June and July 2014, following up on the request for disclosure of the Applicant's disability file and, in a letter and two telephone calls, following up on the status of the request for reconsideration. The adjudicator stated: "This train of events displays that the client was made aware of the lack of legal documentation as well has [*sic*] her lawyer in June 2014 which is 6 months after her appeal period expired." She also stated, "It is reasonable to determine that a law firm is well aware of the legal requirements of an original signature on all government forms authorizing to represent or to communicate for any client or Applicant of CPP Disability." (GD7-5)

[7] The adjudicator did not make any finding that Mr. Gosal had never sent the December 2013 Letter and an original authorization, although she stated that the Respondent had not received them. (GD7-5)

THE TEST FOR LEAVE TO APPEAL

[8] Pursuant to s. 58(1) of the *Department of Employment and Social Development Act* ("DESDA"), there are only three grounds to appeal a decision of the General Division: first, a breach of natural justice or otherwise acting beyond or refusing to exercise jurisdiction; 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.

[9] An appeal to the Appeal Division may be brought only if leave to appeal is granted: DESDA, s. 56(1). According to s. 58(2) of the DESDA, leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. Therefore, the issue before me on this application is whether the Applicant's appeal has a reasonable chance of success.

[10] 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. 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.

SUBMISSIONS

[11] The Applicant submits that the issue before the General Division was whether the Respondent exercised its discretion judicially in deciding not to allow a longer period of time for her to request reconsideration of the Initial Decision. The Applicant submits that the General Division failed to observe a principle of natural justice that required it to act fairly and without bias. In this regard, she submits that she provided additional submissions and documents before the General Division; however, the General Division failed to carry out a proper consideration of all the evidence.

[12] The Applicant pleads that her counsel was well aware of the time limits and a reasonable explanation for the delay was provided. Copies of the December 2013 Letter; a letter dated December 9, 2013, requesting disclosure under the *Privacy Act*; Service Canada form ISP 1603-07-08E "Consent to Communicate Information to an Authorized Person" signed by the Applicant on December 6, 2013; and the front of the original envelope mailed to Service Canada on December 10, 2013, were all provided to the General Division. (GD4-8 to GD4-11)

[13] The Applicant submits that she should not be faulted for her reliance on her counsel's actions and problems with the postal service.

[14] With her submissions on the application for leave to appeal, the Applicant included a letter dated April 2016 that she had signed and that was addressed "To whom it may concern" (AD1-20), as well as a letter from her Member of Parliament dated June 16, 2016 (AD1-22). With respect to these two letters, I have determined they are inadmissible as evidence on the application for leave to appeal. The Federal Court recently confirmed in *Parchment v. Canada (Attorney General)*, 2017 FC 354, at para. 23, "In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing. […] They also do not consider new evidence." (See also *Marcia v. Canada (Attorney General)*, 2016 FC 1367.) These principles apply at the leave to appeal stage as well as on appeal. There are limited exceptions to the rule barring new evidence, such as to address a procedural fairness issue or to provide background information: *Daley v. Canada (Attorney General*), 2017 FC 297, at para.14. In the present case, although the Applicant has alleged a breach of the principles of natural justice based on the allegation that the General Division did not act fairly, neither letter is probative of or relevant to this issue. Nor do they constitute background information. I therefore conclude that these documents are inadmissible and I have not considered them further.

EVIDENCE BEFORE THE GENERAL DIVISION

[15] The Respondent's documents, filed with the General Division, included the following:

a) the December 2013 Letter (GD2-8), which stated:

> I represent [the Applicant]. Enclosed is my Consent to Communicate Information to an Authorized Person.
>
> [The Applicant] requests a reconsideration of the September 16, 2013 decision to deny a CPP Disability pension. It is [the Applicant's] position that she is incapable of pursuing any substantially gainful occupation by way of severe and prolonged chronic pain and back injury.

b) the December 2014 Letter (GD2-7) and enclosures. The December 2014 Letter stated:

> We represent [the Applicant]. Enclosed is our Authorization and Consent to Representation.

> Please note that our original request, along with our original authorization, was sent to Service Canada on December 10, 2013. Due to a lack of response from Service Canada, a copy of our original request and authorization was sent on November 19, 2014.
>
> [The Applicant] once again requests a reconsideration of the September 16, 2013 decision to deny a CPP Disability pension. It is [the Applicant's] position that she is incapable of pursuing any substantially gainful occupation due to her severe and prolonged chronic pain and back injury. [underlining in original]

c) a letter dated December 5, 2014, signed by the Applicant, requesting reconsideration of the Initial Decision.

d) an Authorization and Consent to Representation signed on December 5, 2014 by the Applicant and Mr. Gosal as her representative.

e) a letter dated November 26, 2014 from the Respondent to Mr. Gosal (GD2-11), which stated in full:

> We have received your letter of November 24 2014[1] requesting a reconsideration of the decision concerning [the Applicant's] application for a Canada Pension Plan (CPP) Disability benefit.
>
> In order to proceed with a reconsideration request we require your original request and an authorization containing our client's [*sic*] written consent. An authorization must address Canada Pension Plan in its release, be dated not more than one year before the date of receipt in this office, and must contain an original signature.
>
> The authorization provided cannot be used to process your request because
>
> - It does not contain an **original** signature of [the Applicant]
> - The authorization to communicate form provided is a copy only. We require the original.
>
> Please note that a facsimile (fax) or photocopy can only be accepted if the original will be forwarded to the Appeals Unit.

[1] Mr. Gosal stated in his submissions to the General Division (GD4-5) that, in a letter dated November 19, 2014 (the "November 2014 Letter"), his office "re-sent a copy of our 'original' reconsideration request dated December 10, 2013." The Respondent's November 26, 2014 letter was in response to the November 2014 Letter. Presumably the Respondent received Mr. Gosal's November 2014 Letter on November 24, 2014, and this accounts for reference to this date in the Respondent's letter of November 26, 2014.

> Upon receipt of the original request and correct authorization, we will be pleased to process your request. Thank you for your co-operation. [bold in original, underlining added]

[16] The above documents were all before the adjudicator when she made the decision refusing to allow a longer period of time for the Applicant to request reconsideration.

[17] In her materials filed with the General Division, the Applicant included the following documents:

a) the December 2013 Letter and Service Canada Form ISP 1603-07-08E, "Consent to Communicate Information to an Authorized Person", signed by the Applicant on December 6, 2013 and by Mr. Gosal (GD4-8 to GD4-9). According to the Decision Refusing to Reconsider, photocopies of these documents were provided to the Respondent.

b) a letter from Mr. Gosal to the Respondent dated December 9, 2013, requesting "a complete copy of all documents regarding [the Applicant's] disability file" under the *Privacy Act* and enclosing an authorization for release of the documents to him (GD4-10). It is not clear whether this document was received by the Respondent.

c) a letter from Mr. Gosal to the Respondent dated March 17, 2014, making "another disclosure request" under the *Privacy Act*, enclosing an authorization for release of his client's information to him and requesting that the Respondent provide his office with a complete copy of all documents in the Applicant's disability file (GD4-13). It is not clear whether this document was received by the Respondent.

d) a letter dated June 16, 2014 (GD4-16 and GD4-17) to the Respondent inquiring about the *Privacy Act* request and complaining that, despite his letters of December 9, 2013 and March 17, 2014 concerning this request, he had still not received a complete copy of all documents regarding the Applicant's disability file. He also inquired about the status of his reconsideration request. The part of the letter dealing with the reconsideration request stated:

> We also request an update regarding [the Applicant's] reconsideration application. An application for reconsideration of the September 16, 2013 decision to deny CPP disability benefits was sent to Service Canada on December 10, 2013.

e) It is apparent that the Respondent received the June 16, 2014, letter, as it replied to the letter on July 11, 2014. The Respondent's reply (GD4-19) treated the June 16 letter as an originating request for the Applicant's disability file under the *Privacy Act*. The Respondent's reply made no mention of Mr. Gosal's correspondence of December 9, 2013, or March 17, 2014, nor did it make any mention of his request for an update on the Applicant's request for reconsideration.

f) an affidavit (of the administrative supervisor at Mr. Gosal's law firm) sworn March 7, 2016 ("Affidavit"), swearing information to be true, including that the December 2013 Letter "was sent by standard mail (not trackable) to Service Canada on December 10, 2013" (GD5-3).

g) various memoranda documenting calls made by staff at Mr. Gosal's law firm to Service Canada or the Applicant (GD4-12, GD4-15, GD4-21, GD4-26 to GD4-28).

h) a reporting letter from a lawyer at Mr. Gosal's firm to the Applicant dated June 24, 2014 (GD4-18).

i) medical documents comprising a December 17, 2013, letter from Dr. Navdip Gill, family physician; a March 21, 2013, letter from Dr. A. Mutat, neurosurgeon; and medical imaging reports dated January 16, 2013, and November 6, 2013 (GD1-9 to GD1-14).

j) copies of the face of two stamped envelopes addressed to "Income Security Programs". There is no indication on the envelopes that they have been mailed (i.e. there is no franking on the stamps).

[18] The documents described at para. 17(*a*), (*d*) and (*e*) were before the adjudicator when she made the Decision Refusing to Reconsider.

[19] The documents referred to in para. 17(*f*) through (*i*) were not before the adjudicator when she made her decision.

[20] It is not clear whether the documents described in para. 17(*b*), (*c*) and (*j*) were before the adjudicator when she made the Decision Refusing to Reconsider.

RELEVANT STATUTORY PROVISIONS

[21] Subsection 81(1) of the CPP provides that a party, or any person on behalf of a party, who is dissatisfied with a decision of the Respondent "may within ninety days after the day on which the dissatisfied party was notified […] of the decision or determination, or within such longer period as the Minister may either before or after the expiration of those ninety days allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination."

[22] Subsection 74.1(1) of the CPP Regulations provides that the request for reconsideration shall be made in writing, and sets out what shall be included in a request for reconsideration.

[23] Subsections 74.1(3) and 74.1(4) set out the factors to be considered by the Respondent in making a decision whether to permit a time greater than 90 days to make a request for reconsideration. These subsections state:

> **74.1(3)** For the purposes of subsections 81(1) and (1.1) of the Act and subject to subsection (4), 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.
>
> **(4)** 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 or a party by allowing a longer period to make the request, if the request for reconsideration
>
> **(a)** is made after the 365 day period after the day on which the person is notified in writing of the decision or determination;
>
> **(b)** is made by a person who has applied again for the same benefit; or
>
> **(c)** is made by a person who has requested the Minister to rescind or amend a decision under subsection 81(3) of the Act.

[24] Accordingly, under the CPP Regulations, if a request for reconsideration is made later than 90 days but earlier than or 365 days after the day on which the claimant was notified of an initial decision, the Respondent must be satisfied that the two criteria set out in s. 74.1(3) of the CPP Regulations have been met. If the request for reconsideration is made more than 365 days after the day on which the claimant was notified of an initial decision, the Minister must also be satisfied that the two criteria set out in s. 74.1(4) of the CPP Regulations have been met. In other words, if the request for reconsideration is made in the post-365-day period, if the Minister is not satisfied that all of the four criteria have been met, he or she must refuse the request for an extension of time to request reconsideration.

ANALYSIS

[25] At paras. 4 and 5 of the General Division reasons, the member set out the statutory provisions, including the criteria to be met pursuant to s. 74.1(3) of the CPP Regulations. However, she did not cite anywhere in her reasons, s. 74.1(4) of the CPP Regulations and the criteria to be met therein.

[26] At para. 7, the member correctly stated that the issue before her was to determine whether the Respondent, in deciding not to allow a longer period of time for the Applicant to request reconsideration of the Initial Decision denying her a disability pension, exercised its discretion in a judicial manner. She correctly stated the applicable law at paras. 29 and 30 of her reasons that a discretionary power is not exercised "judicially" if it can be established that 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.

Natural Justice

[27] The Applicant alleges that the General Division failed to observe a principle of natural justice because it did not act fairly, an allegation falling within s. 58(1)(*a*) of the DESDA. In this regard, the Applicant alleges she had provided additional submissions and documents

before the General Division; however, the General Division failed to carry out a proper consideration of all the evidence.

[28] Failure to consider relevant evidence does not in and of itself constitute a failure to observe the principles of natural justice. Rather, if the General Division failed to consider relevant evidence, this would constitute a reviewable error falling within s. 58(1)(*c*) of the DESDA.

[29] On her appeal to the General Division, Applicant's counsel filed a number of documents that were not before the Respondent when it made the Decision Refusing to Reconsider (listed at paras. 17(*f*) through (*i*) above).

[30] In *Canada (Attorney General) v. Dunham*, [1997] 1 F.C. 462, the Federal Court of Appeal considered the jurisdiction of a board of referees to interfere with the exercise of discretion by the Employment and Immigration Commission ("Commission"). The Court noted that the Commission exercised a purely administrative and not a quasi-judicial power and that a hearing before the board of referees was a hearing *de novo*. The Court stated in *obiter*:

> [I]s the board restricted to looking at the facts that were before the Commission or may it base its decision on the evidence heard by the board itself? […] I have no hesitation in believing that we would not be betraying the intention of Parliament if we said that the board of referees is not limited to the facts that were before the Commission. In assessing the manner in which the discretion was exercised, it may have regard to the facts that come to its own attention.

The same principle applies to the General Division when it reviews the exercise by the Respondent of its administrative power to grant or refuse an extension of time to make a request for reconsideration. The appeal before the General Division of the Respondent's decision is also a *de novo* proceeding.

[31] In the present case, the General Division member made no reference to the new evidence that was filed by the Applicant. It is not necessary for a decision-maker to refer in its reasons to every piece of evidence before it; rather, it is presumed to have considered all the evidence: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. However, this presumption may be rebutted if the probative value of the evidence that is not expressly discussed is such

that it should have been addressed: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), at paras. 14–17.

[32] The new evidence filed by the Applicant before the General Division was probative of the issues before the General Division including whether the Applicant had requested reconsideration before expiry of the 90-day time limit and also whether she had a reasonable explanation for the delay and a continuing intention to request reconsideration. The Affidavit and memoranda documenting calls made by Mr. Gosal's staff were relevant to these issues.

[33] There is no indication that the General Division member took any of this evidence into consideration when she determined the Minister had exercised his discretion judicially. As it appears the member may have made findings of fact without regard to all of the material before her, I find the Applicant has raised an arguable ground upon which the proposed appeal might succeed.

[34] Moving to the principal issue that was before the General Division—whether the Respondent had exercised its discretion judicially—as explained below, I believe that the adjudicator did not act in a judicial manner in that she took into account irrelevant factors and ignored relevant factors when she assessed the criteria under s. 74.1(3) of the CPP Regulations (reasonable explanation for the delay and continuing intention to request reconsideration) and the second factor under s. 74.1(4) of the CPP Regulations (no prejudice to the Respondent). The General Division member did not pick up on these issues and therefore she may have based her decision that the Respondent had acted judicially on findings of fact made in a perverse or capricious manner or without regard to the material before her, a reviewable error falling within s. 58(1)(*c*) of the DESDA.

Failure to consider relevant evidence

Criteria under s. 74.1(3) of the CPP Regulations

[35] The adjudicator determined that the Respondent did not receive the December 2013 Letter. Because s. 74.1(1) stipulates that a request for reconsideration must be made *in writing*, an argument can be made that the adjudicator acted reasonably when she did not consider the

December 2013 Letter as constituting the request for reconsideration, or December 10, 2013, as the date on which the request for reconsideration had been made.

[36] However, if the adjudicator had considered the evidence that the December 2013 Letter *had been sent* (even though never received by the Respondent), she may have viewed Mr. Gosal's and his firm's subsequent communications in a different light when assessing whether there was a reasonable explanation for the delay and a continuing intention to request reconsideration, the two criteria needed to be met under s. 74.1(3) of the CPP Regulations. The evidence of such communications consisted of the letter sent by Mr. Gosal on June 16, 2014 inquiring among other things about the status of the request for reconsideration made on December 10, 2013; phone calls made by Mr. Gosal's staff in June 2014 inquiring about the status of the request for reconsideration; and Mr. Gosal's letter on November 19, 2014 (received by the Respondent on November 24, 2014), enclosing his December 2013 Letter (referred to by the Respondent in its reply dated November 26, 2014 (GD2-11)). Moreover, the adjudicator was entitled to take judicial notice that Mr. Gosal, a lawyer and officer of the court, has obligations to courts and tribunals not to attempt to deceive a court or tribunal by offering false evidence or by misstating facts. This lent credence to his assertion that the December 2013 Letter had been sent.

[37] For her part, the General Division member appears to have failed to consider the new evidence, including the Affidavit, and the evidence outlined in the previous paragraph in considering whether the criteria contained in s. 74.1(3) of the CPP Regulations had been met. Therefore, the member may have failed to consider all of the evidence when she decided that the Respondent had acted judicially in determining that the Applicant did not have a reasonable explanation for the delay and did not have a continuing intention to request reconsideration of the Initial Decision. I find this argument, falling within the ground set out in s. 58(1)(*c*) of the DESDA, has a reasonable chance of success.

[38] The adjudicator characterized a number of documents sent by Mr. Gosal in the course of his communications with the Respondent after December 2013 as "invalid" or "not legal" because they were photocopies and not originals, a characterization that the General Division accepted without question.

[39] Section 81 of the CPP contemplates a person on behalf of a contributor making a request for reconsideration. Subsection 74.1(1) of the CPP Regulations states that if the person making the request for reconsideration is not the contributor, the request for reconsideration shall specify the person's name and address and their relationship to the contributor. Mr. Gosal's December 2013 Letter fulfilled all the requirements set out in s. 74.1(1) of the CPP Regulations.

[40] The CPP Regulations do not specify that only "original" documents are to be sent. I note as well that the form ISP 1603-07-08E*"*Consent to Communicate Information to an Authorized Person", which was signed by the Applicant and Mr. Gosal, does not say on its face that only originals will be accepted. (GD4-9)

[41] The adjudicator did not refer in her decision to the basis for the position that only originals were acceptable. To the extent the Respondent had a policy requiring only originals, this is not a requirement set out in the CPP or CPP Regulations. Thus, the adjudicator may have relied on an irrelevant factor in failing to consider photocopies of the December 13 Letter and authorizations signed by the Applicant as evidence to support the two criteria under s. 74.1(3) of the CPP Regulations. For her part, the General Division member, in accepting without question the adjudicator's rejection of photocopies as evidence of the Applicant's explanation for the delay or of her continuing intention to request reconsideration, may have based her decision that the Respondent had acted judicially on an erroneous finding of fact made without regard to the material before her. I find this argument, which engages s. 58(1)(*c*) of the DESDA, has a reasonable chance of success.

Criteria under s. 74.1(4) of the CPP Regulations

[42] Because the request for reconsideration was received after the 365-day deadline, the Respondent also had to be satisfied that the request for reconsideration had a reasonable chance of success and that no prejudice would be caused to the Minister, as required by s. 74.1(4) of the CPP Regulations. The CPP Regulations require that the Respondent be satisfied that both of these factors be met.

[43] Mr. Gosal had enclosed a copy of the December 2013 Letter with his November 19, 2014, letter to the Respondent (which the Respondent received on November 24, 2014). Had

the Respondent not imposed a requirement that the request for reconsideration be an original, it may have accepted the November 2014 Letter instead of the December 2014 Letter as the Applicant's request for reconsideration, moving forward the date on which the request for reconsideration was made by approximately three weeks. Nothing turns on this, however: whether November 24, 2014 or December 15, 2014 is used as the date the reconsideration request was made is immaterial to the analysis since both were received by the Respondent more than 365 days after the Applicant had been notified of the Initial Decision, triggering the requirement that all four criteria under ss. 74.1(3) and (4) had to be satisfied in order for the Respondent to exercise its discretion to accept the late request for reconsideration.

[44] With respect to the "no prejudice" criterion, the adjudicator concluded "[a]s none of the other 3 criteria have been met, it would be unfair to the minister to proceed to reconsideration of a request that is over 365 days late." (GD7-6) I believe the adjudicator did not act judicially in making this finding for two reasons. First, the adjudicator made no finding of "prejudice"; rather, she concluded it would be "unfair" to the Respondent to proceed with the reconsideration. Prejudice is a higher hurdle to meet than unfairness: prejudice imports the notion of harm or injury, whereas unfairness does not. Second, her view that the other three criteria had not been met was irrelevant to a determination of whether prejudice would be caused to the Respondent. There must be some independent basis on which to find that the Respondent would suffer prejudice if the request for reconsideration were allowed to proceed. Therefore, the adjudicator based her finding that the "no prejudice" criterion had not been met on irrelevant factors.

[45] For her part, the General Division member related the adjudicator's finding that it would be "unfair" to the Minister to proceed to a reconsideration at para. 25 of her reasons, but otherwise said nothing about this issue. The General Division member may have concluded that the Respondent had acted judicially with respect to the "no prejudice" issue without considering that the adjudicator had based her finding on irrelevant factors.

[46] Finally, the member did not advert to or consider the criteria that had to be satisfied under s. 74.1(4) of the CPP Regulations. This may have constituted an error of law falling within the ambit of s. 58(1)(*b*) of the DESDA.

[47] Based on the above, I find the Applicant has raised a number of arguable grounds under s. 58(1) of the DESDA upon which the proposed appeal might succeed.

DISPOSITION

[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.

Nancy Brooks
Member, Appeal Division