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

Citation: *C. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 687

Tribunal File Number: AD-16-1265

BETWEEN:

C. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Meredith Porter

DATE OF DECISION: November 29, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed. The matter is referred back to the General Division for reconsideration by a different member.

OVERVIEW

[2] The General Division of the Social Security Tribunal of Canada (Tribunal) refused the Appellant's request for an extension of time to file a Notice of Appeal (Appeal) of the reconsideration decision, which had denied the Appellant a disability pension under the *Canada Pension Plan* (CPP).

[3] The reconsideration decision was dated December 8, 2015. Appellants have 90 days to appeal a reconsideration decision to the Tribunal's General Division. The Appellant filed her Appeal beyond the 90-day time limit. The General Division was tasked with determining whether to allow an extension of time for filing the Appeal. The General Division considered that the Appellant had an arguable case and that no prejudice to the Respondent would result should an extension be granted. However, the General Division denied the extension of time request on the basis that the Appellant had not demonstrated a continuing intention to pursue the appeal and that she had not provided a reasonable explanation for the delay.

[4] The Appellant filed, with the Appeal Division, an application for leave to appeal (Application) the General Division's decision, and leave to appeal was granted on the grounds that the General Division may have breached a principle of natural justice in failing to hold a hearing prior to rendering a decision on the extension of time request, and that it may have also erred in law in failing to properly consider whether the interests of justice would be served in denying the extension of time request.

[5] This appeal proceeded On the Record for the following reasons:

a) The Member had determined that no further hearing would be required.

b) The *Social Security Tribunal Regulations* (SSTR) require that appeals proceed as informally and as quickly as circumstances, fairness and natural justice permit.

ISSUES

[6] The issues before me are twofold:

i. Did the General Division breach a principle of natural justice in failing to provide the Appellant the opportunity to argue her case fully and fairly?

ii. When rendering its decision denying the Appellant an extension of time, did the General Division err in law in failing to demonstrate that the interests of justice had actually been considered?

LEGAL TEST

[7] An appeal of a reconsideration decision must be filed with the Tribunal's General Division within 90 days from the date on which the decision is communicated. Extensions of time may be granted, but in no case may an appeal be brought beyond one year after the date on which the decision is communicated.[1]

[8] In deciding whether to allow an extension of time, Tribunal members must consider and weigh certain criteria as set out in case law. The relevant criteria include: whether there is evidence of a continuing intention to pursue the application or appeal; whether the matter discloses an arguable case; if there is a reasonable explanation for the delay; and, whether prejudice to the other party would result in allowing the extension.[2] The weight to be given to each of the criteria may differ in each case and, in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served.[3]

[1] Paragraph 52(1)(*b*) and subsection 52(2) of the DESD Act.
[2] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[3] *Canada (Attorney General) v. Larkman*, 2012 FCA 204

SUBMISSIONS

[9] The Appellant's counsel submits that the General Division breached a principle of natural justice in failing to hold a hearing prior to rendering its decision denying an extension of time. The Appellant's counsel asserts that the General Division ought to have held a hearing in order to provide the Appellant with the opportunity to explain factors relevant to the General Division's decision.

[10] The Appellant's counsel further submits that the General Division, in determining that the Appellant was not entitled to an extension of time to file her appeal, erred in law in failing to demonstrate that the interests of justice had actually been considered and appropriately weighed.

[11] The Respondent submits that the General Division did not breach a principle of natural justice, as procedural fairness does not require that an in-person hearing be held for extension of time cases, and the Appellant never requested an in-person hearing when she filed her Appeal. The Respondent argues that the Appellant was provided adequate opportunity to explain her case prior to the General Division rendering its decision on the extension of time.

[12] The Respondent further submits that the General Division applied the correct legal test in deciding that the Appellant was not entitled to an extension of time and, although there is no mention of the interests of justice in the analysis portion of the decision, the General Division properly assessed the four criteria of the correct legal test and also mentioned the interests of justice in the conclusion portion of the decision.

STANDARD OF REVIEW

[13] According to subsection 58(1) of the DESD Act, the only grounds of appeal are that:

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.

[14] On reading paragraphs 58(1)(*a*) and (*b*) of the DESD Act, one can see that these provisions permit the Appeal Division to intervene where the General Division has breached a principle of natural justice or has erred in law. There is no qualification restricting the Appeal Division from intervening when such errors are alleged, and there is no indication that the Appeal Division should show any deference to the General Division's findings.

ANALYSIS

Did the General Division breach a principle of natural justice in failing to provide the Appellant the opportunity to argue her case fully and fairly?

[15] I find that the General Division did breach a principle of natural justice. There are gaps that exist in the evidentiary record. The Appellant argues that, instead of holding a hearing to obtain missing information or to clarify evidence in the record before the General Division, the Member rendered a decision on the record, and the decision is based on inferences that the Member made.

[16] The gaps in evidence stem from the fact that the Appellant's first language is Punjabi. Nowhere in the General Division decision is it noted that the Appellant does not speak or write English at a reasonably functional level. There is, however, a record of a telephone call with the Appellant on July 18, 2016, and the Tribunal Member has noted that "[s]he asked me to speak to her daughter whose English is better than hers."

[17] Her counsel has argued that the Appellant lacks a sophisticated understanding of English, which led her to miss important deadlines and also resulted in her mistaken understanding of the correct procedure for filing an appeal with the General Division. Had the Appellant been provided the opportunity to explain the reasons for her delay in filing the Appeal before the General Division, with the aid of an interpreter, her counsel argues that the decision regarding her request for an extension of time might well have turned out differently.

Without the opportunity to explain herself, the Appellant was denied the opportunity to argue her case fully and fairly.

[18] In granting leave to appeal, I found that there is a duty of fairness owed to the parties in this case, as a discretionary decision such as an extension of time decision affects the rights, privileges and interests of the parties involved. In applying *Baker*,[4] a leading *Supreme Court of Canada* case that sets out when a duty of fairness is triggered, I found that, while a decision regarding the method of proceeding is a procedural one, whether a hearing **is** held may change the fact that an Appellant has the opportunity to present her case and fully argue relevant issues. It would have been relevant to the General Division, in considering the method of proceeding, to consider the Appellant's entitlement to an interpreter.[5] The right to interpretation has been found to extend to parties in administrative proceedings.[6] At no point did the General Division offer interpretive services to the Appellant, and yet there is evidence in the record that the Appellant required interpretation (when speaking on the phone for example). I do not find that it was reasonable for the General Division to assume that the Appellant understood what she was required to do in order to advance her rights of appeal, and that she was also aware of time limits that were in place, because all the correspondence sent to the Appellant and all the telephone contact with her was done in her second language, English. The Court in *Baker* held that, when deciding the method of proceeding, "At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly."[7]

[19] In my leave to appeal decision, I also found that the General Division had failed to consider appropriate factors when it had decided to proceed on the record. The Respondent has argued that the fact that the Appellant neglected to request an in-person hearing suggests that she did not think it was necessary to have one. I do not find that this argument holds weight. I acknowledge that the Court in *Baker* stated that "[…] it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible

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[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).
[5] Section 14 rights found in the *Canadian Charter of Rights and Freedoms*, for example, protects individual's rights to interpretation where they do not understand or speak the language in which the proceedings are conducted.
[6] *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2001] 4 FCR 85, 2001 FCA 191; and *R. v. Tran*, [1994] 2 SCR 951, 1994 CanLII 56 (SCC).
[7] *Baker*, *supra*, at para. 30.

nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations." However, I have already found that there is evidence in the record that supports the Appellant's claim that she did not understand the process for advancing her rights of appeal because neither English nor French is her first language. I do not think that it is reasonable to expect that the Appellant, who was also at the time unrepresented, would necessarily understand and appreciate the forms of hearing that were available to her. I also do not find that it is reasonable to expect that the Appellant would know that she was required to request an in-person hearing. In fact, the type of hearing is not necessarily at issue here. The core of the issue is that no hearing was held at all.

[20] Hearings before either Division at the Tribunal may be held in-person, by videoconference, by teleconference, or by written question and answer. While the Respondent has argued that the Appellant "had every opportunity to advance the reasons why her Notice of Appeal was late and why she should be granted an extension of time," I do not find this to be the case. She was not provided an opportunity to be heard on either of those issues, aside from what was asked of her in the Notice of Appeal document. It would have been appropriate to provide the Appellant the opportunity to provide additional evidence by question and answer, for example, regarding the four *Gattellaro* factors.

[21] I find that the Appellant was not provided adequate opportunity to put her case regarding an extension of time fully and fairly. As a result, I find that a breach of natural justice has resulted pursuant to paragraph 58(1)(*a*) of the DESD Act.

In denying an extension of time for the Appellant to file her Appeal, did the General Division err in law in failing to demonstrate that the interests of justice had actually been considered?

[22] In granting leave to appeal, although the Appellant had not raised the issue of the General Division's obligation to provide some analysis on whether the interests of justice would be served in denying the extension of time, I recognized that there may be some evidence that the General Division had failed to provide adequate consideration of this issue. This would be an error of law pursuant to paragraph 58(1)(*b*) of the DESD Act.

[23] The Federal Court of Appeal in *Larkman* acknowledged that, although the four *Gattellaro* factors "guide the Court in determining whether the granting of an extension of time is in the interests of justice," the "overriding consideration is that the interests of justice be served."

[24] In the conclusion section of the General Division's decision, at paragraph 25 of the decision, it states that "[i]n consideration of the *Gattellaro* factors and in the interests of justice, the Tribunal refuses an extension of time to appeal […]." The General Division makes reference to the interests of justice in this final paragraph, but I remain unconvinced that the General Division actually considered whether it would be in the interests of justice to allow the extension of time, as the decision contains no discussion on this point.

[25] The Respondent has argued that, while the General Division did not refer to the interests of justice in the analysis portion of its decision, it was sufficient for the General Division to have mentioned it in its conclusion. Further, it can be reasonably inferred from the General Division's decision that the Member was cognizant that justice must be done between the parties. The fact that the four *Gattellaro* factors were considered and applied, the Respondent agues, was sufficient.

[26] I find, however, that although the General Division cited the principle from *Larkman*, it is not apparent in reading the decision whether the General Division followed it. Not only did the Federal Court of Appeal hold that the overriding consideration is that the interests of justice be served, but in *Larkman*, it also held that not all the four *Gattellaro* factors relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour. While the General Division in this case decided that there was an arguable case and that there was no prejudice to the Respondent, the overriding consideration is that the interests of justice be served. I do not think it is consistent with the Court's reasoning in *Larkman* to assess whether the interests of justice are served by strictly restricting oneself to a consideration of the *Gattellaro* factors. There are other considerations that are likely relevant to the assessment.

[27] There is no documentation from the Tribunal to the Appellant that requests her to address each of the four *Gattellaro* factors or what the consequences might be if she failed to do so. I have already found that there is evidence that suggests that, without the assistance of

interpretive services, the Appellant did not understand the instructions and communication provided to her in English, and there is some suggestion from reviewing the documents in the record that the Appellant might have been reliant on others to assist her in completing Appeal forms. In fact, the Appellant has since sought a representative's assistance in filing and pursuing her Appeal. These were legitimate considerations that the General Division could have addressed in determining whether there was a reasonable explanation for the delay and a continuing intention. It might well have been addressed more fully at a hearing.

[28] The interests of justice are to be a paramount consideration. The Court in *Larkman* recognized that, in some cases, additional considerations would be necessary in order to ensure the interests of justice are served and that justice between parties is done for some applicants attempting to pursue their rights of appeal. In this case, I do not find that the General Division adequately considered additional considerations beyond the four *Gattellaro* factors in determining whether the interests of justice would be served in denying an extension of time, for example, the Appellant's limited understanding of the English language.

[29] The Supreme Court of Canada has held[8] that the reasons for a decision are to be considered together with the outcome to determine whether the decision falls within the range of possible outcomes that is defensible on the facts and the law. In this case, I am satisfied that the General Division decision is not defensible on the law. I acknowledge that the decision to extend time limits for filing an appeal is a discretionary one, but it must be made after considering the relevant law. I do not find that the General Division did so in this case.

[8] See *Newfoundland and Labrador Nurses' Association v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

CONCLUSION

[30] The appeal is allowed.

[31] Section 59 of the DESD Act sets out the remedies that the Appeal Division can give on appeal. It is appropriate in this case that the matter be referred back to the General Division for reconsideration. I am not able to give the decision that the General Division should have given, as none of the evidence has been heard.

[32] To avoid any potential apprehension of bias, the matter should be considered by a different member of the General Division, and the decision refusing to grant an extension of time to file the appeal is to be removed from the record.

Meredith Porter
Member, Appeal Division