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

Citation: *M. G. v. Minister of Employment and Social Development*, 2018 SST 59

Tribunal File Number: AD-16-991

BETWEEN:

M. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: January 23, 2018

Canada

REASONS AND DECISION

INTRODUCTION

[1] On June 19, 2013, the Applicant applied for a disability pension under the *Canada Pension Plan*. Her application was denied by the Respondent initially and upon reconsideration. The reconsideration decision is dated July 23, 2014.

[2] The Social Security Tribunal of Canada (Tribunal) received a call and an email on March 16, 2016, from the Applicant's representative asserting that a notice of appeal was sent to the Tribunal on August 6, 2014. The documents that formed the appeal were attached to the email. The Tribunal has no record of the notice of appeal being received on or around that date.

[3] Prior to rendering a decision, the Tribunal wrote to the Applicant's representative asking for proof that the notice of appeal was sent and/or received in August 2014. In a decision dated May 30, 2016, the General Division found that the notice of appeal was made more than one year from the date of the reconsideration decision and therefore, the Tribunal was not able to grant an extension of time, pursuant to subsection 52(2) of the *Department of Employment and Social Development Act* (DESD Act). The Applicant's representative appealed the General Division decision, and the Tribunal received submissions on August 3, 2016. These submissions included an argument that no leave was required as the General Division decision was a summary dismissal. In a letter dated August 16, 2017, I wrote to the representative asking for submissions as to why leave should be granted if it were determined that the decision of May 30, 2016, was not a summary dismissal.

[4] Additionally, an affidavit sworn on August 2, 2016, was included in the submissions received on August 3, 2016. This information was not before the General Division. As this is new evidence, I will address whether or not to admit it.

[5] This decision details why the General Division decision of May 30, 2016, was not a summary dismissal, why the affidavit sworn on August 2, 2016, will not be admitted and then continues to analyse the arguments in the context of determining whether leave to appeal to the Tribunal's Appeal Division is to be granted.

ISSUES

Was the May 30, 2016, General Division decision a summary dismissal?

[6] In the first application to the Tribunal's Appeal Division (received August 3, 2016), the Applicant's representative argues that no leave determination is necessary in this case as the General Division decision was a summary dismissal pursuant to sections 53(1) and 53(3) of the DESD Act, and there is an appeal as of right when dealing with a summary dismissal from the General Division.

[7] The Appeal Division must decide whether the General Division decision was a summary dismissal.

[8] The pertinent section of the DESD Act, section 53, reads:

> (1) The General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.
>
> (2) The General Division must give written reasons for its decision and send copies to the appellant and the Minister or the Commission, as the case may be, and any other party.
>
> (3) The appellant may appeal the decision to the Appeal Division.

[9] Additionally, section 22 of the *Social Security Tribunal Regulations*, SOR/2013-60 (Regulations), requires that "[b]efore summarily dismissing an appeal pursuant to subsection 53(1) of the Act, the General Division must give notice in writing to the appellant and allow the appellant a reasonable period of time to make submissions."

[10] The Applicant's representative submits that the General Division decision summarily dismissed the Applicant's case and that therefore, in accordance with subsection 53(3) of the DESD Act, no leave to appeal is required.

[11] Subsection 53(1) of the DESD Act allows for summary dismissal if the General Division is satisfied that an appeal has no reasonable chance of success. Prior to delivering the

decision, however, the General Division is required to send notice to the appellant as per section 22 of the Regulations. After a review of the file, it was determined that no such notice was sent.

[12] In the General Division decision of May 30, 2016, there is no reference to the sections in the DESD Act or the Regulations that speak to summary dismissals. Nor is there a statement that the decision was a summary dismissal. Additionally, the test required to determine whether a summary dismissal is appropriate is never mentioned.

[13] In the decision of *W. W. v. Minister of Employment and Social Development*, 2017 CanLII 31740 (SST), my learned colleague very succinctly explained the various ways the test is interpreted to determine whether summary dismissal can be used. Her analysis in paragraphs 26– 28 is as follows:

> [26] Although "no reasonable chance of success" was not further defined in the DESD Act for the purposes of the interpretation of subsection 53(1) of the DESD Act, the Tribunal notes that it is a concept that has been used in other areas of law and that has been the subject of previous Appeal Division decisions.
>
> [27] There appear to be three lines of cases in previous Appeal Division decisions on appeals of summary dismissals by the General Division, namely:
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> a) AD-13-825 (*J.S. v. Canada Employment Insurance Commission*, 2015 SSTAD715), AD-14-131 (*C.D. v. Canada Employment Insurance Commission*, 2015 SSTAD594), AD-14-310 (*M.C. v. Canada Employment Insurance Commission*, 2015 SSTAD237), and AD-15-74 (*J.C. v. Minister of Employment and Social Development*, 2015 SSTAD596). The following legal test was applied: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin v. Canada (Attorney General)*, 2013 CAF 147 (CanLII), 2013 FCA 147, *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1 (CanLII), and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264 (CanLII).
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> b) AD-15-236 (*C.S. v. Minister of Employment and Social Development*, 2015 SSTAD 974), AD-15-297 (*A.P. v. Minister of Employment and Social Development*, 2015 SSTAD973), and AD-15-401 (*A.A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178). The Appeal Division applied a differently articulated legal test: Whether there is a "triable issue" and whether there is any

> merit to the claim using the language of "utterly hopeless" and "weak" case in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear," then the matter would not be appropriate for a summary dismissal. A weak case would not be appropriate for a summary dismissal, as it necessarily involves assessing the merits of the case, examining the evidence and assigning weight to it.
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> c) AD-15-216 (*K.B. v. Minister of Employment and Social Development*, 2015 SSTAD 929). The Appeal Division did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.
>
> [28] I find that the application of the two tests cited in paragraph 27 of this decision leads to the same result in the present case—the appeal has no reasonable chance of success. It is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. It is also clear that this is not a "weak" case but rather an "utterly hopeless" one, as it does not involve assessing the merits of the case or examining the evidence.

[14] Although her analysis is not binding, it should be noted that it does reference Federal Court of Appeal decisions. I do find her analysis, when coupled with other Appeal Division–level decisions, to be persuasive and succinct in outlining how a determination of a summary dismissal is obtained.

[15] In the case before me, the General Division did not engage in any of this analysis; it should be noted that subsection 53(1) of the DESD Act is never mentioned in the decision. In addition, the member did not notify the parties that he was going to summarily dismiss the appeal.

[16] The General Division reviewed the arguments and evidence submitted, and decided the appeal could not proceed based on that analysis. This does not mean the decision was a summary dismissal.

[17] As there was no summary dismissal, I will now consider whether new evidence should be considered and whether leave to appeal should be granted.

Should the Appeal Division accept the affidavit sworn on August 2, 2016?

[18] New evidence cannot be considered by the Appeal Division because the Appeal Division does not conduct *de novo* hearings. It is the General Division's role to review the evidence and make findings of fact. In *Parchment v. Canada (Attorney General)*, 2017 FC 354 (CanLII), the Federal Court again explained the Appeal Division's role in paragraph 23 of the decision:

> In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing of Mr. Parchment's case. They also do not consider new evidence. The Appeal Division's jurisdiction is restricted to determining if the General Division committed an error (ss. 58(1) (a) through (c) of the DESDA) and the Appeal Division is satisfied that an appeal has a reasonable chance of success (58(2) of the DESDA). Only if the criteria of ss. 58(1) and (2) are met does the Appeal Division then grant leave to appeal.

[19] Additionally, Roussel J. wrote in *Tracey v. Canada (Attorney General)*, 2015 FC 1300 (CanLII), that "[u]nder the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves*, at para 108)."

[20] This was further enunciated in *Marcia v. Canada (Attorney General)*, 2016 FC 1367 (CanLII), where it was determined that new evidence does not constitute a ground of appeal. As the Federal Court stated at paragraph 34,

> New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 (CanLII) at para 73).

[21] In a more recent case, *Glover v. Canada (Attorney General)*, 2017 FC 363 (CanLII), the Federal Court referenced *Canada (Attorney General) v. O'keefe*, 2016 FC 503, and concluded that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. The affidavit sworn August 2, 2016, is new evidence and I cannot accept it in the context of this application for leave to appeal; therefore, I have not considered it.

THE LAW

Leave to Appeal Provisions

[22] 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."

[23] 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."

[24] 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
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> (c) The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success. Leave will be granted only where the applicant demonstrates that the appeal has a reasonable chance of success on one or more of the grounds identified in subsection 58(1) of the DESD Act: *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100 (CanLII), at paragraphs 70–73.

Filing Time Limit Provisions

[25] Subsections 52(1) and (2) of the DESD Act explain the time limits for appealing to the Tribunal's General Division:

> 52 (1) An appeal of a decision must be brought to the General Division in the prescribed form and manner and within,
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> (a) in the case of a decision made under the *Employment Insurance Act*, 30 days after the day on which it is communicated to the appellant; and
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> (b) in any other case, 90 days after the day on which the decision is communicated to the appellant.
>
> (2) 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 (my emphasis).

[26] The relevant filing provisions are found in subsection 5(1) of the Regulations, which reads, "Any document required to be filed by these Regulations must be filed with the Tribunal at the address, facsimile number or email address — or in accordance with the electronic filing procedure — provided by the Tribunal on its website."

[27] The deemed filing date provisions are found in section 7 of the Regulations, which reads:

> The date of filing of an appeal, application or other document is deemed to be
>
> (a) in the case of a document that is filed at the Tribunal's address or sent by mail or by facsimile, the date indicated by the date received stamp placed on the document by the Tribunal; and
>
> (b) in the case of a document that is filed by email or in accordance with the Tribunal's electronic filing procedure, the date of receipt indicated by the Tribunal's time stamp.

SUBMISSIONS

The General Division failed to observe a principle of natural justice

[28] The Applicant's representative argues that the General Division failed to observe a principle of natural justice when it decided not to consider any oral evidence.

The General Division erred in law

[29] The Applicant's representative argues that the General Division erred in law in the following ways:

a) The General Division decision misinterpreted the case of *Canada (Attorney General) v. Vinet-Proulx*, 2007 FC 99, by comparing the facts in that case to the facts in the Applicant's case; and

b) The General Division did not fully investigate its archives to determine if, in fact, the notice of appeal had been received in 2014, and was unable to produce evidence in this regard.

The General Division based its decision on an erroneous finding of fact

[30] The General Division decision was based on the finding that the original appeal had been filed more than one year after the day on which the decision had been communicated to the Applicant, which the Applicant's representative argues is untrue. The Applicant's representative argues that the appeal was filed within the prescribed period of time.

ANALYSIS

Does the allegation that the General Division failed to observe a principle of natural justice by not providing the Applicant the opportunity to provide oral evidence have a reasonable chance of success on appeal?

[31] In submissions, the Applicant's representative argues that the Applicant should have had the opportunity to provide oral evidence with respect to the request for the extension of time.

[32] The General Division rendered its decision without a hearing. There was no notice of hearing sent to the parties as the Tribunal does not hold hearings to decide requests for time extensions. However, on May 10, 2016, the Tribunal wrote to the Applicant's representative with the following request:

> The Tribunal acknowledges the email from the Appellant's Representative of March 16, 2016, in which it is asserted that the Notice of Appeal in this matter

> (and related documents) were first sent to the Tribunal on August 6, 2014 (GD1). However, the Tribunal has no record of having received those earlier documents.
>
> Following-up on the March 22, 2016 call from Tribunal staff, the Appellant (or her Representative) is asked to provide the Tribunal with proof that the Notice of Appeal was sent and/or received in August 2014. Such proof, if available, ought to be provided to the Tribunal **on or before May 20, 2016**. (GD-3)

[33] The Applicant's representative responded on May 18, 2016, asserting that the materials had been sent on August 6, 2014.

[34] The General Division rendered its decision on May 30, 2016, without any further submissions.

[35] The General Division's authority to grant an extension of time is set out in subsection 52(2) of the DESD Act and section 4 of the Regulations. Section 25 of the Regulations further explains that a person requesting an extension of time may do so by "filing their appeal with a statement that sets out the reasons why the General Division should allow further time for the bringing of the appeal."

[36] None of the provisions indicate that a hearing is required to decide on the issue of an extension of time.

[37] However, in a letter dated May 10, 2016, the General Division member did write to the Applicant's representative to offer an opportunity to provide submissions and proof as to when the appeal had been sent and/or received.

[38] The Applicant's representative responded by sending the documents he alleged had been sent on August 6, 2014, and at that time provided no additional submissions or evidence of delivery of the documents.

[39] The General Division member offered the Applicant's representative the opportunity to provide information that would prove an alternate date of appeal, other than the deemed date as determined by the General Division member. Based on the submissions, the General Division member weighed the evidence and determined that the appeal was not made within the one-year time limit.

[40] Allegations that there has been a breach of natural justice are serious and it should be noted that the only submissions from the Applicant's representative on the matter are located in AD1-5 and AD1-7, where it is stated that:

> By failing to provide a forum for the Appellant to give testimony in regard to the factual issues behind sending the appeal documents this Member has failed to observe the principle of natural justice particularly when the issue of credibility was vital to determining the factual issues.
>
> […]
>
> The Member failed to provide the Appellant with natural justice by failing to permit oral testimony as in the leading case he cited.

[41] Given that there is no legislative requirement for an oral hearing to determine the issue of an extension of time, I fail to see that this ground has a reasonable chance of success on appeal. There is no provision in the legislation that entitles the Applicant to an oral hearing to determine the issue of an extension of time to file. Leave to appeal on this ground is refused.

Does the allegation that the General Division erred in law by misinterpreting the case of *Vinet-Proulx* have a reasonable chance of success on appeal?

[42] The Applicant's representative submits that the *Vinet-Proulx* case was misread. In submissions, he argues:

> The Member completely misread the sole case, *Canada (A-G) v. Vinet-Proulx*, 2007 FC 99. He relied upon a ratio which is entirely unrelated to the facts at hand as well as the law. The Member based his decision entirely on the *Vinet* decision which is easily distinguishable from the case at hand. Further the Member entirely misrepresented what the *Vinet* case represents in law applying a principle in law which simply does not exist nor which law comes out of the *Vinet* case. The *Vinet* case was decided upon jurisdictional grounds not on the grounds the Member has relied upon.
>
> Further the Member decided this case on "factual grounds" attempting to say the same facts existed in the *Vinet* case. This is not true. The *Vinet* case involved Old Age Security application to the Minister. Our case involves an appeal and administrative error of the Tribunal and not the Minister.
>
> The only similarity between the two cases involves making a factual finding as to whether documents were sent and considered filed, even if not received.

[43] Although the *Vinet-Proulx* case involves an Old Age Security application to the Minister, it clearly speaks to statutory time limits for filing and the Review Tribunal's jurisdiction.

[44] In explaining the similarities between *Vinet-Proulx* and this case, the General Division member explains at paragraphs 11 and 12:

> In reaching its conclusion, the Tribunal has drawn on the Federal Court's decision in *Canada (A.G.) v. Vinet-Proulx*, 2007 FC 99. In *Vinet-Proulx*, Justice Martineau found that the obligation was on Ms. Vinet-Proulx to make an application for benefits to the relevant government department. As such, Ms. Vinet-Proulx could not obtain further retroactivity of her benefits based on an application that was inexplicably lost, even though there was good evidence that the application had been sent by mail.
>
> This case is similar in that it was the appellant's obligation to bring her appeal to the Tribunal in the manner set out in s. 52(1) of the DESD Act. Though there is some evidence of the appeal documents being sent, there is no evidence that they were ever received by the Tribunal and neither the Appellant nor her Representative followed-up until well after the 90-day and one-year time limits in the DESD Act had expired. Like in *Vinet-Proulx*, the Tribunal finds that it cannot rely on the earlier documents when assessing this request for an extension of time, even though it appears that those documents were inexplicably lost.

[45] Although it is evident from the *Vinet-Proulx* decision that the Federal Court ultimately defined the jurisdiction of the Review Tribunal, in reaching its decision the Federal Court relied on the wording found in the legislation that spoke to how time limits for filing are determined.

[46] The General Division member's letter to the Applicant's representative dated May 10, 2016, gave the Applicant's representative the opportunity to provide proof of when the documents had been sent and/or received. However, we can see from paragraph 6 of the General Division decision that:

> [t]he Appellant's Representative responded on May 18, 2016, asserting again that the materials had been sent to the Tribunal on August 6, 2014, and attaching another copy of those materials (GD4). However, no additional evidence, such as a receipt or delivery confirmation from Canada Post, was filed to show that the documents were sent and/or received in 2014.

[47] The General Division member offered the Applicant the chance to provide evidence that there was an alternative date of receipt of the appeal. Unfortunately for the Applicant, the

General Division member found that the submissions of May 18, 2016, did not provide him with enough evidence to determine that the appeal had been received at an earlier date by the Tribunal.

[48] Although *Vinet-Proulx* is a case about an Old Age Security application, the use of it to articulate how the fact scenarios are similar, and how determining filing dates is prescribed by legislation, is not so offensive as to give rise to an argument that may have a reasonable chance of success on appeal. Leave to appeal on this ground is refused.

Does the allegation that the General Division erred in law by failing to fully investigate its archives to determine if the appeal had been received in 2014 have a reasonable chance of success on appeal?

[49] The Applicant has not identified any statutory requirement that obligates the Tribunal to investigate its archives. The Tribunal has acknowledged that the first date of receipt of the appeal was March 16, 2016. As was noted in the submissions, the Tribunal sends out confirmation of receipt of applications. We can see from the file that the first time an acknowledgement of receipt of the application was sent was after the receipt of the March 16, 2016, documents.

[50] The obligation to ensure an application is received by the Tribunal rests with the applicant (or their representative). This ground of appeal has no reasonable chance of success on appeal and therefore, leave to appeal is refused.

Does the allegation that the General Division erred in fact in finding that the original appeal was filed more than one year after the day on which the decision was communicated to the Applicant have a reasonable chance of success on appeal?

[51] The General Division decision was based on the finding that the original appeal had been filed more than one year after the day on which the reconsideration decision had been communicated to the Applicant. The Applicant's representative argues that the appeal was filed within the prescribed period of time.

[52] I have reviewed the record and the evidence that was provided, and I have not identified any basis for determining that the General Division made an erroneous finding of fact. An

appeal to the Appeal Division is not an opportunity to re-argue the case, hoping for a different result (*Marcia v. Canada (Attorney General)*, 2016 FC 1367 (CanLII), at paragraph 34; *Parchment v. Canada (Attorney General)*, 2017 FC 354 (CanLII), at paragraph 23).The Applicant was given an opportunity to provide submissions relating to when the appeal was sent and/or received. It was for the General Division member to weigh the evidence before him and make a decision.

[53] The Appeal Division's job, as per subsection 58(1) of the DESD Act, is to determine, without delving directly into an adjudication of the merits of the file, whether the reasons for appeal fall within any of the specified grounds and whether they have a reasonable chance of success. The Appeal Division does not have jurisdiction to conduct a *de novo* hearing. An applicant's disagreement with the General Division decision does not constitute an error in law or fact. This allegation that the General Division member based his decision on an erroneous finding of fact has no reasonable chance of success on appeal.

[54] In the Federal Court's decision in *Griffin v. Canada (Attorney General)*, 2016 FC 874, Justice Boswell provided guidance as to how the Appeal Division should address applications for leave to appeal under subsection 58(1) of the DESD Act:

> It is well established that the party seeking leave to appeal bears the onus of adducing all of the evidence and arguments required to meet the requirements of subsection 58(1): see, e.g., *Tracey*, above, at para 31; also see *Auch v. Canada (Attorney General)*, 2016 FC 199 (CanLII) at para 52, [2016] FCJ no 155. Nevertheless, the requirements of subsection 58(1) should not be applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 (CanLII) at para 10, [2016] FCJ no 615.

[55] I have reviewed the key pieces of evidence with respect to the filing date, and I have not found that any of the evidence was misconstrued or overlooked by the General Division.

CONCLUSION

[56] The General Division decision of May 30, 2016, was not a summary dismissal, so I conducted the leave-to-appeal analysis on the issues identified above. I have concluded that the Applicant has not raised any arguable ground upon which the proposed appeal may succeed. In

addition, after reviewing the key pieces of evidence, I have found that no evidence was misconstrued or overlooked. I am therefore satisfied that the proposed appeal has no reasonable chance of success.

[57] Leave to appeal is refused.

Jennifer Cleversey-Moffitt
Member, Appeal Division