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

Citation: *A. S. c. Minister of Employment and Social Development*, 2018 SST 394

Tribunal File Number: AD-18-69

BETWEEN:

A. S.

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: April 9, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is granted.

OVERVIEW

[2] The Applicant, A. S., applied for a *Canada Pension Plan* (CPP) disability benefit on October 26, 2009. This was her third application. The Minister of Employment and Social Development denied her first application, made in 2001, initially and upon reconsideration, and her appeal to a Review Tribunal (predecessor to the General Division) was dismissed. The Minister also denied her second application made in 2003. The Applicant did not request reconsideration of that denial.

[3] The Applicant's third application was denied initially on June 28, 2010. She did not request a reconsideration of that decision until almost six years later, on February 29, 2016. The Minister refused to grant an extension of time to request reconsideration because she had not met the conditions set out in s. 74.1(3) and s. 74.1(4) (the s. 74.1 criteria) of the *Canada Pension Plan Regulations* (CPP Regulations). The Applicant appealed to the General Division.

[4] The General Division determined that the Minister had not exercised his discretion judicially when he refused the late request for reconsideration. Pursuant to his power under s. 54 of the *Department of Employment and Social Development Act* (DESDA), the General Division member went on to give the decision the Minister should have given. While the member was prepared to accept that three of the four s. 74.1 criteria had been met, he concluded the Applicant had not demonstrated a continuing intention to request reconsideration from 2010 to 2016. He rejected the Applicant's argument that not all four s. 74.1 criteria need to be met in order for an extension to be granted. He therefore dismissed the appeal.

[5] I have concluded that the Applicant has raised an arguable case on one of her arguments and, therefore, leave to appeal should be granted.

ISSUES

Issue 1: Is there an arguable case that the General Division erred in its interpretation and application of s. 74.1 of the CPP Regulations?

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding that the Applicant had not demonstrated a continuing intention to request reconsideration?

ANALYSIS

[6] An appeal to the Appeal Division may be brought only if leave to appeal is granted.[1] Furthermore, leave to appeal must be refused if the Appeal Division is satisfied that the proposed appeal has no reasonable chance of success.[2]

[7] As mandated by the DESDA, there are only three grounds on which an appeal may be brought to the Appeal Division:

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.[3]

[8] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It presents a different and appreciably lower hurdle to be met than the one that must be met at the appeal stage: at the leave to appeal stage, the applicant is required to establish that the appeal has a reasonable chance of success on at least one of the grounds in s. 58(1) of the DESDA, whereas at the appeal stage, the applicant must prove his or her case on the balance of probabilities.[4] In

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[1] *Department of Employment and Social Development Act* (DESDA), s. 56(1).
[2] DESDA, s. 58(2).
[3] DESDA, s. 58(1).
[4] *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC).

the context of an application for leave to appeal, having a reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed.[5]

[9] Therefore, the question I must answer on this application is whether the Applicant has raised an arguable ground upon which the appeal might succeed.

Issue 1: Is there an arguable case that the General Division erred in its interpretation and application of s. 74.1 of the CPP Regulations?

[10] The Applicant's representative argues that the General Division erred in law in its interpretation and application of s. 74.1 of the CPP Regulations. His argument is, in essence, that the four conditions set out in s. 74.1 do not all have to be met. Instead, he contends, the approach to granting an extension of time taken in decisions such as *Canada (Attorney General) v. Pentney*[6] and *Canada (Minister of Human Resources Development) v. Hogervorst*[7] should apply to decisions of the Minister under s. 74.1. In these cases and others, the courts have identified a non-exhaustive list of four criteria to be considered when exercising discretion to grant an extension of time, and have held that not all four criteria need be satisfied for an extension to be granted. In such cases, the overriding consideration is that justice be done between the parties. The Applicant's representative argues that "codifying the common law test into the legislation showed the legislature strongly supported the four factors set out in the test together with the judicial guidance on their application".[8] He contends that the member should have concluded the Applicant was not required to demonstrate a continuing intention to request reconsideration between 2010 and 2016. His position is that "it could not be reasonably expected of the Appellant [the Applicant] to have demonstrated her continuing intention"[9] to seek reconsideration during this period.

[11] The Applicant's representative also argues that the principle articulated by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*[10]—that benefits-conferring legislation such as the CPP should be interpreted in a broad and generous manner, with ambiguities in

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[5] *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[6] 2008 FC 96.
[7] 2007 FCA 41.
[8] AD1-6.
[9] AD1-7.
[10] 2001 FCA 248.

language being resolved in the claimant's favour—should be applied to s. 74.1. He submits that requiring all four criteria set out in s. 74.1 to be met does not accord with this principle.

[12] I find these arguments have no reasonable chance of success on appeal.

[13] The common law has identified a non-exhaustive list of four criteria to be considered and weighed when a decision-maker is called upon to decide whether to grant an extension of time. The factors are:

> (i) the person requesting the extension has demonstrated a continuing intention to pursue the application or appeal;
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> (ii) the matter discloses an arguable case;
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> (iii) the person requesting the extension has a reasonable explanation for the delay; and
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> (iv) there is no prejudice to the responding party in allowing the extension.

[14] The courts have directed that not all four criteria need be met, and the overriding concern is whether justice is done between the parties. The common law test has been applied in a wide variety of situations, for example, to requests for extensions of time sought under Rule 8 of the *Federal Courts Rules* and to requests for extensions of time to file an appeal to the General Division and the Appeal Division.

[15] *Pentney* and *Hogervorst* were concerned with the question of whether, respectively, a Review Tribunal and the Pension Appeals Board (predecessor to the Appeal Division) should have granted an extension of time to bring an appeal. *Pentney* concerned a decision of the Review Tribunal to extend time to appeal the Minister's reconsideration decision. *Hogervorst* concerned a decision granting an extension of time to appeal to the Pension Appeals Board.

[16] Unlike *Pentney* and *Hogervorst* and other cases where the courts or a tribunal have applied the common law test, s. 74.1 of the CPP specifies criteria that must be met before the discretion to extend time arises. The Minister has no discretion to exercise until he is satisfied that the s. 74.1 criteria have been met.

[17] Subsection 81(1) of the CPP permits a claimant to request reconsideration of the Minister's decision within 90 days after the day on which the claimant was notified of the decision or within such longer period as the Minister may allow. Subsections 74.1(3) and 74.1(4) of the CPP Regulations govern when the Minister may allow such longer period. 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.
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> **(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
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> **(a)** is made after the 365-day period after the day on which the person is notified in writing of the decision or determination
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> [underlining added]

[18] Accordingly, under the CPP Regulations, if a request for reconsideration is made more than 90 days but less than or equal to 365 days after the day on which the claimant was notified of the initial decision, the Minister must be satisfied that the two criteria set out in s. 74.1(3) of the CPP Regulations have been met. The conjunction "and" directs that the Minister must be satisfied that both conditions are met. Only then does the Minister's discretion to grant an extension come into existence.

[19] If the request for reconsideration is made more than 365 days after the day on which the claimant was notified of the initial decision, the Minister must "also" be satisfied that the two additional criteria set out in s. 74.1(4) of the CPP Regulations have been met. Again, the conjunction "and" means that the Minister must be satisfied that both conditions in s. 74.1(4) are met. Thus, given the clear wording of s. 74.1, the Minister must be satisfied that all four conditions set out in ss. 74.1(3) and 74.1(4) have been met. Only then is his discretion to grant an extension of time engaged. The only constraint on his decision at that point is the requirement that he exercise his discretion judicially.

[20] As the Applicant's request for reconsideration was made almost six years after the initial decision was communicated to her, s. 74.1(4) applied. Unless the Minister was satisfied that all four criteria had been met, he had to refuse the request for an extension of time to request reconsideration; he had no discretion to do otherwise. The same constraint applied to the General Division's decision to make the decision the Minister should have made, pursuant to its authority under s. 54 of the DESDA: the General Division had no discretion to exercise unless it was satisfied that all four criteria had been met.

[21] Contrary to the Applicant's submission that Parliament must have incorporated the common law approach into these provisions, including that not all four criteria need be met and that justice between the parties is the paramount concern, in s. 74.1, Parliament has clearly stipulated that the Minister has no discretion to exercise unless he is satisfied that the applicable criteria have been met. The common law test cannot apply to supplant the clear wording of the statute. Furthermore, the principle in *Villani* cited by the Applicant's representative is not engaged because there is no ambiguity in s. 74.1.

[22] The Applicant's representative submits that the Minister should take a contextualized, purposive approach to determining whether all four criteria need to be met. While a contextualized approach may be taken when assessing the evidence to determine whether each criterion is met, I do not agree that a contextualized approach applies to exempt the Minister from the clear statutory requirement that all four criteria must ultimately be met before he has discretion to grant an extension of time under s. 74.1(4). The same principles apply to the General Division when making a decision the Minister should have made, under s. 54(1) of the DESDA.

[23] I conclude this ground of appeal does not have a reasonable chance of success.

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding that the Applicant had not demonstrated a continuing intention to request reconsideration?

[24] The Applicant's representative submits that the General Division made a capricious finding of fact that the Applicant had not demonstrated a continuing intention to request

reconsideration.[11] The representative submits "it could only reasonably be expected of her to pursue reconsideration when she was well enough to do so". He also submits that because the General Division stated that credibility was not an issue,[12] the member should have accepted the Applicant submission that "[o]nly in 2015 did the Appellant feel well enough to seek legal assistance from QLA [Queen's Legal Aid] and subsequently request a reconsideration of the 2010 decision" as evidence that the Applicant's intention to request reconsideration continued throughout the entire delay.[13] He also relies on a General Division decision and a Federal Court decision to argue that "the seeking of legal advice functions as evidence of continuing intention".[14]

[25] The Applicant's representative also contends that the member was aware of the Applicant's circumstances, yet he did not consider them in weighing the criterion of continued intention. He cites two decisions of the Federal Court[15] for the proposition that the General Division should have taken a contextualized approach to the evidence relating to whether the Applicant had a continuing intention to request reconsideration. He argues that "[i]n light of the Appellant's poor mental and physical health, and 'unique circumstances' which were recognized by the Member as justifying the delay in filing the reconsideration request, it is submitted that it could not be reasonably expected of the Appellant to have demonstrated her continuing intention during this time."[16]

[26] Bearing in mind the lower threshold that needs to be met by the Applicant to be granted leave to appeal, I am satisfied that the Applicant has raised an arguable case with respect to a possible error falling within the scope of s. 58(1)(*c*) of the DESDA.

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[11] AD1-9.
[12] The General Division gave this as one of the reasons why the hearing proceeded by written questions and answers: Reasons, para. 5.
[13] AD1-9.
[14] *B.S. v. Minister of Employment and Social Development*, 2016 SSTGDIS 52; *Canada (Attorney General) v. Berhe*, 2008 FC 967.
[15] *Belo-Alves v. Minister of Social Development*, 2009 FC 413; and *Jama v. Canada (Attorney General)*, 2016 FC 1290.
[16] AD1-7.

CONCLUSION

[27] The application for leave to appeal is granted on the second ground, i.e. there is an arguable case that the General Division may have committed an error falling within the scope of s. 58(1)(*c*) of the DESDA when it concluded the Applicant had not demonstrated a continuing intention to request reconsideration. The appeal on the merits will deal only with this issue.

[28] Within 45 days after the date of this decision, the parties may file submissions on this issue, or file a notice stating that they have no submissions to file.[17]

Nancy Brooks
Member, Appeal Division

SUBMISSIONS BY:	Frank Piazza, Representative for the Applicant

[17] *Social Security Tribunal Regulations*, s. 42.