



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. O. v. Minister of Employment and Social Development*, 2016 SSTADIS 418

Tribunal File Number: AD-16-120

BETWEEN:

M. O.

Applicant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: October 26, 2016

REASONS AND DECISION

DECISION

Extension of time to appeal and leave to appeal are granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal (SST) dated October 19, 2015, in which it found that she abandoned her appeal from a reconsideration decision of the Respondent denying her an Old Age Security (OAS) pension.

[2] On January 5, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division (AD) of the SST. She denied that she had abandoned her appeal and alleged that she always intended to pursue her appeal. Following a request for further information from the AD, the Applicant perfected her application for leave on June 9, 2016, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

BACKGROUND

[3] The Applicant applied for a disability pension under the *Old Age Security Act* in November 2009. The Respondent denied the application at both the initial and reconsideration levels. In July 2012, the Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT).

[4] In a decision dated March 21, 2013, the OCRT allowed her appeal to proceed. In April 2013, The OCRT transferred the appeal to the SST pursuant to the *Jobs, Growth and Long-Term Prosperity Act*.

[5] On March 20, 2015 the GD requested that the Applicant provide a valid telephone number at which she could be reached for the purposes of a teleconference hearing. In a Notice of Hearing dated April 10, 2015 and addressed to the Applicant's residential address in the

Philippines, the GD notified the Applicant that a teleconference hearing would be held on September 9, 2015 at 5:30 a.m., Philippines time.

[6] On September 8, 2015, the Applicant telephoned the SST to advise she was waiting to be connected to the teleconference. A member of the SST staff recorded the following call log:

The appellant is waiting for a teleconference hearing to begin. Her notice of hearing says that the TM [Tribunal Member] will contact her to connect her to the teleconference on September 9, 2015 at 5:30 am Philippine Time. I informed the appellant that I would forward this to the CMO [Case Management Officer] and that we will get back to her. There is a 12-hour time difference with her and she can be reached in the morning Eastern Time as is will be evening for her.

[7] On September 10, 2015, a member of the SST staff noted that he made two unsuccessful attempts to call the Applicant at the telephone number she had provided earlier.

[8] On October 19, 2015, the GD issued its decision, declaring the Applicant's appeal abandoned because she was "unreachable." In its reasons, the GD noted that the Applicant did not attend the hearing at the scheduled time. The GD member wrote that he attempted to telephone her several times after the hearing start time, without success. As well, SST staff had been unable to reach the Applicant at the telephone number on file, and she not made contact since her failure to appear at the hearing.

THE LAW

SST Regulations

[9] Paragraph 3(1)(a) of the *Social Security Tribunal Regulations* (SST Regulations) states "[t]he Tribunal must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit."

[10] Subsection 3(2) of the SST Regulations provides that "[i]f a question of procedure that is not dealt with by these Regulations arises in a proceeding, the Tribunal must proceed by way of analogy to these Regulations."

[11] Section 6 of the SST Regulations says that "[a] party must file with the Tribunal a notice of any change in their contact information without delay."

[12] Section 12 of the Regulations specifies that “[i]f a party fails to appear at a hearing, the Tribunal may proceed in the party’s absence if the Tribunal is satisfied that the party received notice of the hearing.”

[13] Section 28 of the Regulations states “[a]fter every party has filed a notice that they have no documents or submissions to file—or at the end of the applicable period set out in section 27, whichever comes first—the Income Security Section must without delay:

- (a) make a decision on the basis of the documents and submissions filed; or
- (b) if it determines that further hearing is required, send a notice of hearing to the parties.”

DESDA

[14] Pursuant to paragraph 57(1)(b) of the DESDA, an application for leave to appeal must be made to the AD within 90 days after the day on which the decision was communicated to the Applicant.

[15] The AD must consider and weigh the criteria as set out in case law. In *Canada (Minister of Human Resources Development) v. Gattellaro*,¹ the Federal Court stated that the criteria are as follows:

- (a) The Applicant must demonstrate a continuing intention to pursue the appeal;
- (b) There is a reasonable explanation for the delay;
- (c) The matter discloses an arguable case; and
- (d) There is no prejudice to the other party in allowing the extension.

¹ *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883

[16] The weight to be given to each of the *Gattellaro* factors 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—*Canada (Attorney General) v. Larkman*.²

[17] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted, and the AD must either grant or refuse leave to appeal.

[18] Subsection 58(1) of the DESDA sets out that the only grounds of appeal are the following:

- (a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The GD 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.

[19] Subsection 58(2) of the DESDA provides that “leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.”

[20] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] F.C.J. 1252. The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[21] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success.

² *Canada (Attorney General) v. Larkman*, 2012 FCA 204

ISSUES

[22] I must decide two questions: Should an extension of time to make the application for leave to appeal be granted? If so, does the appeal have a reasonable chance of success? Both questions turn on whether the Applicant has an arguable case.

SUBMISSIONS

[23] In a letter received by the SST on January 5, 2016, the Applicant wrote that she was shocked and surprised to receive the GD's decision that she had abandoned her appeal. She acknowledged receiving a notice advising her of the September 9, 2015 teleconference and claimed that she had cleared her schedule to ensure she was available to participate in the call. She went as far as to tell the caretakers in her apartment building to wake her up.

[24] The next night, she said, she bought a long distance calling card and telephoned Ottawa. She spoke to a male, who said he would have someone call her, although no one ever did. She phoned again and this time a lady answered. She said she would have someone get in touch with her but heard nothing. She suspects that SST staff could not get through to her because it is especially difficult to get a connection to the Philippines during Canadian business hours.

[25] She insisted that everything she has done has been in good faith. She feels emotionally drained in her quest for her OAS pension.

[26] In a letter received by the SST on April 4, 2016, the Applicant added further detail to the circumstances surrounding the missed teleconference. The notice of hearing specified that the teleconference would begin on September 9, 2015 at 5:30 a.m., Philippines time. She waited at home with her grandson but nobody called. Despite the assertion in the GD's abandonment decision, no one to her knowledge from Ottawa ever called her. She is frustrated and feels she has been treated unfairly; she only wants another chance to be heard.

ANALYSIS

[27] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that on October 20, 2015 the GD's decision was mailed to the Applicant at her last known residential address in the Philippines. According to subsection 19(a) of the *Social*

Security Tribunal Regulations, a decision is deemed to have been communicated to a party 10 days after the date on which it was mailed. In her application requesting leave, the Applicant indicated that she did not receive the GD's decision until December 10, 2015, which she said was sent to her sister's insurance company. By the time she submitted her (incomplete) application requesting leave, on January 5, 2016, much of the 90-day deadline had elapsed. Following several telephone exchanges in which the Applicant attempted to understand precisely what missing information she was required to send, she finally completed her appeal on June 9, 2016—232 days after the GD's decision was mailed.

[28] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[29] The record indicates that the Applicant responded to the GD's abandonment decision within the 90-day deadline and was thereafter in regular contact with the SST until she completed her appeal. I am willing to give the Applicant the benefit of the doubt on this factor and find that she had a continuing intention to pursue the appeal.

Reasonable Explanation for the Delay

[30] The Applicant resides in the Philippines and her distance from Canada would account for at least part of the delay in submitting missing information, which she did by international post. The Applicant's correspondence also suggests that she was confused and overwhelmed by what she perceived were onerous filing requirements, a submission I am willing to accept, given the fact that she has been managing her appeal by herself and without the benefit of professional assistance.

Arguable Case

[31] In essence, the Applicant argues that the GD failed to observe a principle of natural justice when it declared her appeal abandoned and closed her file. She claims that she was treated unfairly because she wanted a hearing on her OAS application and never intended to abandon her appeal.

[32] Having reviewed the GD's decision against the record, I see a reasonable chance of success on appeal. Although it is not specifically referred to in the SST Regulations, the concept of abandonment emerges from the general authority of an administrative tribunal to regulate the proceedings before them. Where notice of a hearing has been properly given to an appellant, and neither the appellant nor anyone on his or her behalf appears at the scheduled hearing, it is within the discretion of an administrative tribunal to declare the appeal abandoned. In my view, abandonment connotes neglect or loss of intention to pursue an appeal, but I do not find that here. While the GD member and SST staff were unable to connect to the Applicant using the telephone number she had given them, the record suggests that her intention to pursue her appeal never flagged, even though technological and/or human lapses ultimately defeated the teleconference. The fact that the Applicant called the SST on September 8 (which, because of the time difference, would have been September 9—the date of the scheduled hearing in Canada) would appear to corroborate her claim that she was waiting at home for the telephone to ring.

[33] In addition, a case can be made that, contrary to the GD's findings, the Applicant was not "unreachable," and she had made contact with the SST immediately following the scheduled hearing time.

Prejudice to the Other Party

[34] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

CONCLUSION

[35] As the Applicant has fulfilled all four *Gattellaro* factors, I have determined that this is an appropriate case to allow an extension of time to appeal beyond the 90-day limitation pursuant to subsection 57(2) of the DESDA.

[36] Furthermore, given the history of proceedings and the considerations above, I am satisfied that the Applicant has an arguable case on appeal that the GD may have failed to observe a principle of natural justice in determining that she abandoned her appeal.

[37] I invite the Respondent to submit its position on the merits of this appeal. The parties are also free to make submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

[38] This decision granting leave in no way presumes the result of the appeal on the merits of the case.



Member, Appeal Division