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

Citation: *G. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 131

Tribunal File Number: AD-16-672

BETWEEN:

G. S.

Applicant

and

Minister of Employment and Social Development

Respondent

and

H. K.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: March 30, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal (Tribunal) dated February 17, 2016, which determined that the appeal of the Respondent's reconsideration of July 7, 2014, had not been brought on time. The Applicant appealed the reconsideration decision on October 13, 2015, more than one year after it had been made.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (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.

[4] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within the permitted grounds of appeal and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300. The Applicant submits that the General Division failed to observe a principle of natural justice.

BACKGROUND HISTORY

[5] As the General Division proceeded on the record, the Applicant did not have the opportunity to make any oral submissions. The member relied on the Notice of Appeal to determine when the Applicant received the reconsideration decision. The Applicant indicated on the Notice of Appeal that he had received the reconsideration decision on July 7, 2014 and on February 12, 2015. The member determined that it was unlikely that the Applicant had received the reconsideration decision on the date on which it had been mailed, so "[took] judicial notice of the fact that mail in Canada is usually received within 10 days" and that, in this case, the reconsideration decision had to have been communicated to the Applicant by July 17, 2014.

[6] The member noted that the Applicant had filed an incomplete appeal on May 6, 2015, as he had failed to provide a telephone number, a facsimile number and/or an e- mail address. The Tribunal mailed a letter dated May 19, 2015, to the Applicant, notifying him that it considered his appeal incomplete and that he was required to provide his contact information. The Applicant denies that he ever received the Tribunal's letter of May 19, 2015.

[7] In October 2015, the Applicant contacted the Tribunal to enquire about the status of the appeal and was informed that the appeal was incomplete because it was missing contact information. By then, before he could even provide the missing information, more than one year had elapsed from the time that he was deemed to have received the reconsideration decision.

[8] The General Division referred to section 52 of the DESDA and to sections 23 and 24 of the *Social Security Tribunal Regulations* (Tribunal Regulations). Section 52 of the DESDA requires that an appeal be brought within 90 days after the day on which a reconsideration is communicated to an appellant; subsection 52(2) of the DESDA allows the General Division to allow further time within which an appeal may be brought, but by no more than one year after the day on which the reconsideration decision was communicated to the appellant. Sections 23 and 24 of the Tribunal Regulations describe how an appeal is to be brought; paragraph 24(1)(*g*) of the Tribunal Regulations stipulates that the appeal must

contain the appellant's full name, address, telephone number and, if any, facsimile number and email address. The member determined that, as the Applicant had failed to include his telephone number, his appeal was deficient and he therefore had not fully complied with the Tribunal Regulations.

SUBMISSIONS

[9] The Applicant's submissions set out a similar history. He confirmed that he filed an appeal in May 2015, but that he had inadvertently omitted a contact telephone number. He described the omission as an "honest mistake" and denies that he was attempting to provide misleading information. The Applicant argued that the General Division's decision is "against natural justice and ethical law."

ANALYSIS

[10] The Applicant disagrees with the outcome of the General Division's decision, but that unto itself does not indicate that there has been a breach of the principles of natural justice, or that it is somehow unethical. Natural justice is concerned with ensuring that an applicant has a fair and reasonable opportunity to present their case, that they have a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension of appearance of bias. There is no indication or any evidence that, although the General Division proceeded on the record without an oral hearing, it deprived the Applicant of a reasonable and fair opportunity to present his case, or that it exhibited any bias. After all, the Applicant does not allege that his submissions or position would have been any different had there been an oral hearing.

[11] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division failed to observe a principle of natural justice.

[12] Apart from having neglected to provide a telephone number, the Applicant has otherwise fully complied with the requirements in bringing an appeal before the Tribunal.

[13] In *L. N. v. Minister of Employment and Social Development*, 2015 SSTAD 538, I dealt with a somewhat similar situation, albeit the appeal in that case was before the Appeal

Division. The Applicant L. N. did not perfect her application requesting leave to appeal until well after more than one year had elapsed from the time the decision of the Review Tribunal had been communicated to her. In her case, she had neglected to provide a copy of the reconsideration decision, but had otherwise fully complied with the requirements. At paragraphs 40 and 41, I wrote:

> While it is desirable that an applicant produce a copy of the decision in respect of which leave to appeal is being sought, its absence ought not to be the sole basis upon which a leave application should be rejected or dismissed, when that applicant has, in all other respects, seemingly complied with the requirements of the DESDA and the *Regulations*.
>
> It seems that a plain reading and application of subsection 57(1) of the DESDA and sections 3, 39 and 40 of the *Regulations* should lead me to dismiss this leave Application, but as I have indicated above**, it would seem to lead to an absurd and unjust result that an application is dismissed because it either lacks a copy of the decision in respect of which leave to appeal is being sought, or the applicant is late in producing a copy of that decision.** (My emphasis)

[14] In *L. N.,* I concluded that the application had not been properly made, but determined that I could vary the provisions and requirements under the Tribunal Regulations, by applying paragraph 3(1)(*b*) of the Tribunal Regulations, provided that there were "special circumstances." In the facts of that case, I determined that there were "special circumstances" that warranted varying the Tribunal Regulations or dispensing LN. from complying with a provision. However, I indicated that "special circumstances" ought not to be loosely defined, and that I did not think it should be widely available.

[15] I have not determined whether there were "special circumstances" to warrant varying the Tribunal Regulations or dispensing the Applicant from complying with any provisions. However, I am prepared to find that there is an arguable case that the General Division should have considered whether it would have been appropriate to apply paragraph 3(1)(*b*) of the Tribunal Regulations and that, by failing to do so, this may have resulted in an error. This is not to suggest that, had the member considered paragraph 3(1)(*b*) of the Tribunal Regulations, the member would have necessarily found that there were "special circumstances." I do note, however, that the DESDA has its origins in social benefits

conferring legislation, to which the *Old Age Security Act* belongs, and that it would seem to defeat the purpose of such legislation if appeals can be so readily dismissed on the basis of a defect in form or a technical irregularity.

[16] I make one final note in this matter, although it has no bearing on the outcome of this application. The General Division determined that the reconsideration decision must have been communicated to the Applicant by no later than July 17, 2014, given that it took judicial notice of the fact that "mail in Canada is usually received within 10 days." It was inappropriate for the General Division to rely on its authority to take judicial notice of facts that are not generally and widely recognized. After all, there are limits to the reach of judicial notice, as set out by the Supreme Court of Canada in *R. v. Find* (2001), SCC 32 (CanLII), 154 CCC) (3d) 97 (SCC) and *R. v. Spence* (2005), 2005 SCC 71 (CanLII), 202 CCC (3d) 1 (SCC). As McLachlin C.J. set out, at paragraph 48:

> […] the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 1982 CanLII 1751 (ON CA), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[17] The presumption of mail delivery within 10 days is a reasonable one, but mail delivery within 10 days is not a matter that can be characterized as being subject to the doctrine of "judicial notice."

CONCLUSION

[18] The application for leave to appeal is granted. This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division