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

Citation: *B. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 522

Tribunal File Number: AD-17-271

BETWEEN:

B. R.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: October 6, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] This is an appeal of a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), which determined that the Respondent's decision to refuse the Applicant's late reconsideration request was discretionary and made both judicially and judiciously. The Applicant has now filed an application requesting leave to appeal the General Division's decision.

BACKGROUND

[2] The Applicant is an Old Age Security (OAS) pension recipient. On July 27, 2015, the Respondent notified the Applicant that, based on her reported income for 2014, it had decided to reduce the amount of her Guaranteed Income Supplement (GIS) for the 2015/2016 payment period. In a letter date-stamped January 16, 2016 (GD2-8), the Applicant requested a reconsideration of the Respondent's decision. She stated that she was aware that the 90-day time period to request a reconsideration had passed, although she offered no explanation for the delay. The letter also made reference to an "attached original request" dated November 2015, although the record does contain a copy of such a request.

[3] In a letter dated March 12, 2016, the Respondent advised the Applicant that her request for reconsideration could not be considered because the mandatory 90-day time period had passed. It did, however, provide an explanation as to how the Applicant's GIS entitlement was determined for the 2015/2016 payment period. The letter also stated that the Applicant had the right to appeal the decision to the Tribunal's General Division and that she had to submit a Notice of Appeal that contained all the required information within 90 days of her receipt of the reconsideration decision letter.

[4] On November 1, 2016, well beyond the 90-day time limit set out in paragraph 52(1)(*a*) of the *Department of Employment and Social Development Act* **(**DESDA), the Applicant submitted an incomplete appeal to the Tribunal regarding the Respondent's decision of March 12, 2016. Following requests for additional information, the Applicant completed her appeal on November 15, 2016. She explained that her appeal was late because she was waiting for her T4 slips to support her change in income. She also stated that she had been dealing with health issues.

[5] The presiding General Division member evidently decided that an oral hearing was unnecessary and proceeded on the basis on the documentary record. Her decision, issued March 10, 2017, did not address the fact that the appeal to the General Division itself was submitted past the statutory deadline, but she decided the appeal on the substantive question of whether the Respondent had exercised its discretion judicially in refusing to consider an extension of time for the Applicant to request a reconsideration. Having reviewed the file, the General Division found that the Respondent had exercised its discretion judicially.

[6] On March 28, 2017, the Applicant submitted to the Appeal Division an incomplete application requesting leave to appeal the General Division's decision. Following requests for additional information, the Applicant perfected her appeal, and Tribunal staff declared it complete on April 6, 2017, with the time period specified in paragraph 57(1)(*a*) of the DESDA.

THE LAW

Old Age Security Act

[7] Section 27.1 of the *Old Age Security Act* (OASA) states that a person who is dissatisfied with a decision or determination made under the Act with respect to payment of a benefit or the amount of a benefit may, within 90 days after receipt of the Minister's decision or determination, request a reconsideration of the decision or determination. The Minister may, either before or after the expiration of those 90 days, allow the request to be submitted in the proper form within a longer period of time.

[8] Subsection 28(1) of the OASA allows a party to appeal the Minister's decision to deny further time to make a request for reconsideration to the Tribunal. Subsection 29.1(1) of the *Old*

Age Security Regulations (OAS Regulations) states that Minister may allow a longer period to make a request for reconsideration if the Minister is satisfied that there is a reasonable explanation for requesting a longer period and that the person has demonstrated a continuing intention to request a reconsideration.

Department of Employment and Social Development Act

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

[10] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[11] According to subsection 58(1) of the DESDA, 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.

[12] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] 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.*[2]

[13] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

SUBMISSIONS

[14] In her application requesting leave to appeal dated March 23, 2017, the Applicant submitted that she did request reconsideration on time and that the General Division based its decision on an erroneous finding of fact:

> All correspondence requesting reconsideration that were initiated by me were sent to (Statement of Contributions 2009-11) address:
>
> Contributor Client Services
> Canada Pension Plan
> P.O. Box 9750, Postal Station T
> Ottawa, ON K1G 4A6
>
> And from there were forwarded to the Respondent (X, ON). To the best of my recall, letters were sent in Oct/Nov 2015, January 2016 and February 2016.
>
> The Respondent's March 12, 2016 letter was received after a phone call from her stating "you keep sending the letters" and "you will be getting a letter."

[15] The Applicant also wrote that, when she was considering making an appeal to the Tribunal, she realized that, until her total income for 2016 was actualized, her claim that the GIS adjustment had been duplicated would have amounted to mere speculation. She decided to strengthen the basis of her appeal and await receipt of her T4A slips to confirm there had been duplication and "to show that the embedded amounts and discrepancies."

[16] The Applicant also claimed that she suffered from health issues during the period, including colon cancer, rheumatoid arthritis and lower back disc collapse.

[17] In a follow up letter dated March 29, 2017, the Applicant presented a detailed argument that the Respondent had reduced her GIS in defiance of the facts and in contravention of the law.

ISSUE

[18] The Appeal Division must decide whether the Applicant's submitted grounds have a reasonable chance of success on appeal.

ANALYSIS

Late Appeal to the General Division

[19] I note that the Applicant's appeal to the General Division was filed past the 90-day period specified by the DESDA. The General Division nevertheless proceeded to consider the merits of the Applicant's appeal without addressing the fact that it was filed late. In so doing, the General Division implicitly granted the Applicant an extension of time to appeal, even if it offered no reasons for it.

[20] As this lapse, if it was that, had no bearing on the outcome of the General Division's decision, and since the Respondent raised no prior objection to it, I find it irrelevant to the present appeal.

The General Division's Jurisdiction Over Discretionary Decisions of the Respondent

[21] The Applicant's submissions raise the question of the scope of the General Division's jurisdiction regarding the Respondent's decisions. Under section 54 of the DESDA, the General Division is empowered to "dismiss, confirm, rescind or vary a decision of the Minister or the Commission, in whole or in part or to give the decision that the Minister or the Commission should have given." Section 28 of the OASA provides jurisdiction to the Tribunal over a decision refusing to extend the time within which to request a reconsideration. The Applicant takes issue with the manner in which the General Division reviewed the Ministerial decision that refused to extend the time for him to file a request for reconsideration of its earlier decision.

[22] The Federal Court of Appeal has discussed the powers and jurisdiction of the predecessor to the Tribunal, the Office of the Commissioner of Review Tribunals: *Canada v. Vinet-Proulx.*[3] In *Canada v. Dublin Estate*,[4] the Federal Court determined that the Review

[3] *Canada* (*Attorney General) v. Vinet-Proulx*, 2007 FC 99.

Tribunal (RT), the General Division's predecessor body, did not have jurisdiction to order the Minister to take an action that was absent from the powers set out in subsection 27.1(2) of the OASA. Under this subsection, the Minister can, in response to a request for reconsideration, confirm or vary its initial decision, approve payment of a benefit or determine whether a benefit is payable. The court, however, held that the Minister was not empowered to make *ex gratia* payments, as the RT had ordered in *Dublin Estate.*

Tests to Determine Whether the Respondent Acted Judicially and Judiciously

[23] In its decision, the General Division conducted a review of the record and concluded that the Respondent was correct to find that the Applicant had failed to request a reconsideration of the decision to reduce her GIS within 90 days of that decision being communicated to her. As the Applicant herself conceded that her request for reconsideration was late, I see no erroneous finding of fact, nor do I disagree with the General Division's finding that the decision on whether to extend the time for filing a late reconsideration request was a discretionary one.

[24] Still, that does not end the matter. Citing *Canada v. Uppal*,[5] the General Division noted that the Respondent had a duty to exercise its discretion in a "judicial manner." Although the Applicant did not frame her request for leave to appeal as such, the major issue here is whether the General Division applied the correct legal test in determining that the Respondent acted judicially and judiciously. In its decision, the General Division correctly cited *Canada v. Purcell*[6] as an authority in determining whether discretion had been exercised judicially. According to *Purcell*, one must ask whether the decision maker:

- acted in bad faith;
- acted for an improper purpose or motive;
- took into account an irrelevant factor;
- ignored a relevant factor; or
- acted in a discriminatory manner.

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[4] *Canada (Minister of Human Resources Development) v. Dublin Estate*, 2006 FC 152.
[5] *Canada (Attorney General) v. Uppal*, 2008 FCA 388.
[6] *Canada (Attorney General) v. Purcell*, [1996] 1 FCR 644, 1995 CanLII 3558 (FCA).

[25] In *Purcell*, the Federal Court, in citing *Canada v. Smith*,[7] was clear that a decision-maker must act in good faith when exercising discretionary power and that discretionary decisions are reviewable only where the decision-maker has acted in bad faith, erred in law or relied on a misapprehension of the facts:

> I take that term to mean that if it can be established that the decision-maker acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner, then any decision which flows from the exercise of a discretionary power will be set aside.

[26] The General Division concluded that the Respondent had acted judicially in refusing to consider the Applicant's request for reconsideration. However, the only one of the five *Purcell* factors it analyzed at any length was whether the Respondent ignored a relevant factor:

> [14] Based on the information on file, the Appellant acknowledged in her letter dated January 16, 2016 that she submitted her reconsideration request beyond the 90 day time period. The Tribunal noted that in the same letter, she did not provide any explanation for the delay.
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> [15] Also based on the information on file, although the Appellant refers to an original request in November 2015 in her January 2016 request for reconsideration letter, there is no evidence that the Appellant submitted a request in November 2015 or that she made any further contact with the Respondent until her reconsideration request date stamped on January 16, 2016. Also, the Tribunal noted that the Appellant stated in her January 2016 request for reconsideration letter that it was after careful consideration, that she decided to request a review of the July 2015 reduction in GIS income. It would appear that she made her decision to request a reconsideration in January 2016.

[27] These passages, which form the bulk of its analysis, indicate that the General Division assessed the available evidence and concluded that the Applicant had not: (i) requested a reconsideration any earlier than January 2016; (ii) provided a reasonable explanation for the delay; or (iii) demonstrated a continuing intention to appeal. However, the General Division appears to have misunderstood its role; it was not tasked with assessing whether the Applicant met the requirements of subsection 29.1(1) of the OAS Regulations, but whether the *Respondent* had properly considered the Applicant's evidence that she did so.

[28] The distinction is elusive but important. The issue before the General Division was whether the Respondent (i) exercised its discretion judicially and judiciously; (ii) considered

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[7] *Canada (Attorney General) v. Smith* (1994), 167 N.R.105 (F.C.A.)

the two criteria set out in subsection 29.1(1) of the OAS Regulations in reaching its decision to refuse reconsideration; and (iii) provided intelligible reasons for how that decision was reached.

[29] Here, I see indications that the Respondent did not exercise its discretion judicially. I note that the Respondent's March 12, 2016 letter flatly advised the Applicant that it could not consider her reconsideration request because 90 days had passed, but it made no mention of the Applicant's note that she had previously submitted an "original request" in November 2015. I also note that the Respondent's file contained no notes or adjudication summaries that suggested someone within the Department directed their mind to the Applicant's submissions and her implied claim that her prior correspondence might have been misplaced or misdirected. This is not mere speculation, as casual inspection of the hearing file gives rise to a suspicion that it may be missing various documents, most notably the letter, purportedly dated July 27, 2015, by which the Respondent first notified the Applicant that her GIS was being reduced.

CONCLUSION

[30] I am granting leave to appeal because I see an arguable case that the General Division erred in law by failing to consider whether the Respondent exercised its discretion to refuse the Applicant an extension of time to request a reconsideration in a judicial manner, as prescribed by subsection 29.1(1) of the OAS Regulations.

[31] Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[32] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division