Citation: *M. L. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 138

Appeal No. AD-13-216

BETWEEN:

M. L.

Applicant

and

Minister of Human Resources and Skills Development

Respondent

and

L. L.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Extension of Time and Leave to Appeal Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: June 4, 2014

DECISION

[1] The Social Security Tribunal refuses the application to extend the time for filing and the application for leave to appeal to the Appeal Division of the Social Security Tribunal.

BACKGROUND & HISTORY OF PROCEEDINGS

[2] The Applicant seeks an extension of time for filing an application for leave to appeal, and also seeks leave to appeal the decision of the Review Tribunal issued on January 8, 2013. The Review Tribunal found that the Applicant and his former spouse had waived their rights to a division of unadjusted pensionable earnings under the *Canada Pension Plan*.

[3] The Applicant filed an Application for Leave to Appeal and Notice of Appeal (the "First Application") with the Pension Appeals Board on April 23, 2013 and it was accepted for filing by the Appeal Division of the Social Security Tribunal (the "Tribunal") on April 25, 2013. Both filing dates fall beyond the 90-day deadline permitted under the *Department of Employment and Social Development* (DESD) *Act.*

[4] A copy of the stamped envelope indicates that the Applicant mailed the First Application to the Pension Appeals Board on April 15, 2013.

[5] The Applicant also filed an Application Requesting Leave to Appeal to the Appeal Division on February 6, 2014 (the "Second Application").

ISSUE

[6] Should the Appeal Division extend the time for filing of the Application?

[7] Does this appeal have a reasonable chance of success?

THE LAW

[8] According to subsection 57(2) of the DESD Act, "the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant".

[9] 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".

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

APPLICANT'S SUBMISSIONS

Late Filing of Application

[11] In the First Application, the Applicant stated that he had received the decision of the Review Tribunal on January 15, 2013. The form itself did not indicate when leave applications were required to be filed. The Applicant did not provide any explanation as to why the First Application had been filed more than 90 days after the decision had been communicated to him.

[12] The Second Application was filed on February 6, 2014, using the form "Application Requesting Leave to Appeal to the Appeal Division". The form indicates that leave applications are required to be made 90 days after receiving a decision of the Review Tribunal. The form also requires an applicant to provide an explanation for the delay. Here, the Applicant stated that he had received the decision of the Review Tribunal on January 30, 2013, which, if true, would mean that the First Application had been filed within the time permitted. In any event, it appears that the Applicant does not consider his leave applications to be late, and in this regard, refers to the correspondence he received from the Tribunal, which states, "… the Tribunal will consider the application to have been filed on time if we receive the requested information by January 29, 2014".

[13] The Applicant has not offered any explanation as to why he has cited two different dates as to when he might have received the decision of the Review Tribunal.

Application for Leave

[14] The Applicant advises that he is seeking a division of the unadjusted pensionable earnings ("DUPE") for the period during which he and his former spouse were married. He relies on a written separation and financial agreement dated April 1, 1998 entered into in British Columbia (the "Separation Agreement") with his former spouse. The applicable portion of the Agreement reads:

> 7. Subject to the contents of Paragraphs 5,6,7,8,and 9, the Husband and the Wife acknowledge that all assets including any business, monies, savings, investments, pensions, (including the Canada Pension Plan and the wife's Altamira Group R.S.P.), real property, insurance, or the like in the name and/or possession of the Wife shall be the sole and exclusive property of the Wife with the Husband having no interest whatsoever in and to the same, and all assets including any business, monies, savings investments, pensions (including the Canada Pension Plan), RRSP.'s, real property, insurance, or the like in the name and/or possession of the Husband shall be the sole and exclusive property of the Husband with the Wife having no interest whatsoever in and to the same.

[15] The Applicant submits that the Review Tribunal erred, by:

(a) Failing to consider the "literal wording and underlying spirit of the [A]greement". The Applicant submits that the parties had agreed to evenly split all assets acquired during the course of their marriage.

(b) Failing to properly apply the law. The Applicant relies on communications with "CPP staff". Presumably this is in reference to communications received from Human Resources and Development Canada ("HRSDC"). There is a letter from HRSDC dated August 23, 2011 which states, "If a spousal agreement entered into on or after June 4, 1986, specifically mentions that no division of Canada Pension Plan pensionable earnings is to take place, and the agreement has not been invalidated by a court order, the request for division of credits cannot be approved."

[16] The Applicant's appeal largely arises over the interpretation of subsection 55.2(3) of the *Canada Pension Plan,* over whether it requires that any separation agreement explicitly mention that no division of Canada Pension Plan pensionable earnings is to take place.

[17] Despite the Applicant's reliance on his communications with HRSDC, there is also a letter dated December 21, 2011 which states, "A spousal agreement does not have to specifically use the term "credit splitting" when the agreement indicates a clear and final settlement of present and future interests that one party has in the property of the other".

[18] In the Second Application, the Applicant again submits that the parties had agreed to equally divide all assets acquired during marriage. He also submits that the Review Tribunal failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its discretion

OTHER SUBMISSIONS

[19] Neither the Respondent nor the Added Party filed any written submissions.

ANALYSIS

Late Filing of Application

[20] In the First Application, the Applicant indicated that he had received the decision of the Review Tribunal on January 15, 2013. Formerly, section 83 of the *Canada Pension Plan* stipulated that if a party was dissatisfied with a decision of a Review Tribunal, he was permitted to apply for leave to appeal that decision to the Pension Appeals Board within 90 days after the day on which that decision had been communicated to that party. The Applicant did not provide any explanation as to why the First Application had been filed more than 90 days after the decision had been communicated to him.

[21] In *Canada (Minister of Human Resources Development) v. Dawdy,* 2006 FC 429, The Federal Court of Canada found that the Member of the Pension Appeals Board had

erred in law, exceeded his jurisdiction or failed to exercise his jurisdiction in granting leave to appeal when Mr. Dawdy had not applied for an extension of time to seek leave.

[22] Based on the First Application alone, *Dawdy* would have required that the Applicant apply for an extension of time to seek leave. I would not have granted an extension without a clear request from the Applicant. However, I am prepared to accept the reasons provided in the Second Application as a request for an extension of time to seek leave.

[23] Subsections 57(1)(b) and (2) of the DESD Act now govern late filings. Similar to the former section 83 of the *Canada Pension Plan,* an application for leave to appeal must be made to the Appeal Division, in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant. Subsection 57(2) enables the Appeal Division to allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

[24] In *Canada (Minister of Human Resources Development) v. Gattellaro,* 2005 FC 833, the Court set out the four criteria which the Appeal Division should consider and weigh in determining whether to extend the time period beyond 90 days within which an applicant is required to file his application for leave to appeal, as follows:

1. A continuing intention to pursue the application or appeal
2. The matter discloses an arguable case
3. There is a reasonable explanation for the delay, and
4. There is no prejudice to the other party in allowing the extension.

[25] I am persuaded that the Applicant had a continuing intention to pursue the application and that there is no prejudice to the other parties to these proceeding if an extension were allowed, as the delay involved is relatively short, at 8 days after the time limit for doing so had expired.

[26] The Applicant has not provided any explanation as to why the First Application is late, and I can only infer that it is late as he chose to mail it on the date by which he was required to have filed it with the Tribunal. This may not have been altogether unreasonable, as the Applicant may have understood that his application could be posted on the same date as to when an application is to be made, to comply with section 57 of the *Canada Pension Plan.* That section does not specify that when an application is to be made, that it must be physically received by the Tribunal within 90 days.

[27] As well, the Applicant stated in the Application Requesting Leave to Appeal to the Appeal Division, filed on February 6, 2014, that he had been informed by the Tribunal that, "… given that we are advising you today that this application is incomplete; the Tribunal will consider the application to have been filed on time if we receive the requested information by January 29, 2014". The Applicant did not provide any further response to explain the initial delay in filing the First Application. It may be that he did not provide an adequate explanation, given the letter from the Tribunal. That said, this does not explain why the Applicant was subsequently late in providing the requested information to the Tribunal. The letter from the Tribunal indicated that his application would be considered "on time" if it received the requested information by January 29, 2014. The information was not received by the Tribunal until February 6, 2014. I assume that the Applicant was again late, for the same reason that he posted his mail on the same day that the requested document should have been received by the Tribunal.

[28] I am not satisfied that there is a reasonable explanation to account for the delay in filing the First Application. However, that does not conclude my consideration of the leave request. *Lavin v. Attorney General of Canada,* 2001 FC 1387 allows me to grant an extension of time even if one of the four factors set out in *Gattellaro* have not been satisfied. This leaves me to consider finally whether the matter discloses an arguable case. I will address this issue in the context of the leave application.

Application for Leave

[29] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, 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] FCJ No. 1252 (FC).

[30] Subsection 58(1) of the DESD Act set 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.

[31] For our purposes, the decision of the Review Tribunal is considered to be a decision of the General Division.

[32] I am required to determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal and whether any of them have a reasonable chance of success.

a. <u>Failure to Observe Principle of Natural Justice</u>

[33] In the Second Application form, the Applicant submits that the Review Tribunal failed to observe a principle of natural justice. While he employs the language set out in subsection 58(1) of the DESD Act, he does not go any further by identifying what principle of natural justice the Review Tribunal may have failed to observe, or how it might have failed to observe the principle. If I am to be able to meaningfully assess the leave application, an Applicant ought to, at the very least, set out the very errors which the Review Tribunal is alleged to have made, and which fall into the permitted grounds of appeal. He has not done so in this regard. Effectively, the Applicant has not set out a proper ground of appeal under this heading.

b. Error in Law

[34] Section 55 and 55.1 of the *Canada Pension Plan* set out the circumstances under which a division of unadjusted pensionable earnings shall take place. The Minister is obligated to make the division unless the exception provided by subsections 55.2(2) and (3) applies. These subsections provide that a separation agreement is not binding on the Minister unless the separation agreement *expressly* mentions the Canada Pension Plan and indicates the intention of the spouses, or former spouses that there be no division of unadjusted pensionable earnings.

[35] The provisions of such a separation agreement must also be expressly permitted under the provincial law that governs such agreements. Currently, Quebec, Saskatchewan, Alberta and British Columbia have introduced DUPE opt-out provisions. Spouses are unable to opt out of the DUPE in the other provinces, as they do not have any legislation that would permit them to do so. Here, the separation agreement was entered into in British Columbia, which provides for opting out of the division of unadjusted pensionable earnings.

[36] The Applicant submits that the Review Tribunal committed an error in law in its interpretation of subsection 55.2(3) of the *Canada Pension Plan*. He submits that in order to waive the parties' rights to a division of unadjusted pensionable earnings, the separation agreement had to specifically mention that no division of Canada Pension Plan pensionable earnings or credit splitting was to take place. He points out that the Agreement did not use this precise language. The Applicant has not referred me to any authorities in support of this proposition.

[37] The case of *Osadchuk v. Osadchuk*, 2002 CarswellNat 5578, 2002 C.E.B. & P.G.R. 8740 (P.A.B.) provides some guidance as it bears some factual similarities. There, the parties' separation agreement stated that:

> The Wife agrees to release the Husband from any claim which she may have against the Husband's pension plans, namely the Alcan Pension Plan and Canada Pension Plan, and in consideration the Husband has paid to the Wife the sum of $7,500.00.

[38] The Pension Appeals Board found that the separation agreement in that case was sufficient to show the wife's intention to waive her rights to a division of unadjusted pensionable earnings. The parties in *Osadchuk* did not specifically mention that no division of Canada Pension Plan pensionable earnings or credit splitting was to take place, yet the Pension Appeals Board found the separation agreement to be clear in expressing the parties' intention that there be no division of unadjusted pensionable earnings.

[39] I am bound by the provisions of the *Canada Pension Plan*, and find that there is no arguable case that the Review Tribunal committed an error in law in finding that the parties had waived their rights to unadjusted pensionable earnings.

c. Interpretation and Intent of Separation Agreement

[40] The Applicant submits that the Review Tribunal erred in interpreting the Agreement, and further, that it failed to give any consideration to the underlying intention of the parties that they equally divide marital assets accumulated during the marriage.

[41] I have dealt with how the Agreement is to be interpreted, where it concerns a division of unadjusted pensionable earnings. What the parties may have intended overall is of no particular relevance, as subsection 55.2(3) of the *Canada Pension Plan* applies when dealing with *Canada Pension Plan* pensionable earnings.

d. Summary

[42] As the Applicant has not shown that he has an arguable case, I am not prepared to exercise my discretion and extend the time within which an application for leave to appeal is to be made.

[43] Even if an extension of time had been granted, the Application requesting leave to appeal would have been refused, as the Applicant has not shown that he has an arguable case or that the appeal has a reasonable chance of success.

CONCLUSION

[44] The request to extend the time for filing is refused, as are the First and Second Applications requesting leave to appeal.

Janet Lew
Member, Appeal Division