Citation: *D. H. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 161

Appeal No. AD-13-55

BETWEEN:

D. H.

Applicant

and

Minister of Human Resources and Skills Development

Respondent

and

B. B.

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 25, 2014

DECISION

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

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on April 9, 2013, which she received on April 16, 2013. The Review Tribunal had determined that a *Canada Pension Plan* survivor's pension was not payable to the Applicant, as it found that although she remained legally married to her spouse (the "Deceased"), he had been residing common-law with the Added Party at the time of his death on June 16, 2011.

[3] The Applicant filed an application requesting leave to appeal (the "Application") with the Social Security Tribunal on July 17, 2013, two days beyond the 90-day deadline permitted under the *Department of Employment and Social Development* (DESD) *Act.*

ISSUE

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

[5] If so, does the appeal have a reasonable chance of success, so that leave to appeal can be granted?

THE LAW

[6] 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".

[7] According to subsections 56(1) and 58(3) of the 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".

[8] 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

[9] The Applicant explains that her Application was late as her parents had been in the hospital recently. This "put [her] behind a bit".

Leave Application

[10] The Applicant made extensive submissions, which can be summarized as follows:

1. The Review Tribunal committed a breach of the principles of natural justice. She obtained the Added Party's documentation late - at the hearing -- and was not provided with sufficient time to review it. The Review Tribunal offered her an adjournment of the proceedings, but allegedly advised that she was unlikely to receive another hearing in person.

2. The Review Tribunal committed an error in law in failing to follow a temporary court Order pronounced on June 21, 2007 by the Superior Court of Justice of Ontario. The Court ordered *inter alia* that the Deceased "shall maintain all benefits available to him through his past employer and/or pension plan for the benefit of the Respondent". The Applicant also notes that the Deceased had contemplated that she would receive *Canada Pension Plan* survivor's benefits in his employment retirement package.

3. The Review Tribunal based its decision on numerous erroneous findings of fact. The Applicant submits that much of the evidence of the Added Party was false and misleading. In particular, the Applicant submits that the Added Party swore a false declaration that she resided common-law with the Deceased, or that they resided together for several years. The Applicant submits that the Added Party and the Deceased could not have been residing together, given the errors (such as the misspelling of the Deceased's surname) in the Added Party's application for survivor's benefits. During the Review Tribunal hearing, the Added Party explained that there may have been inaccuracies in her application for survivor's benefits, as she had relied on a Service Canada employee to complete the form on her behalf. The Applicant questions the veracity of this, as there were seeming inconsistencies in the evidence of the Added Party.

4. The Applicant also relies on the fact that banking documentation shows that mortgage payments for a property were made solely by the Added Party. She also relies on a document entitled the *Survivorship Application – Land* filed with the Land Registrar, which indicates that the property held in joint tenancy between the Deceased and the Added Party was determined not to be "a matrimonial home within the meaning of the *Ontario Family Law Act* of the deceased at the time of death". The Applicant submits that there was no "matrimonial home" between the Deceased and the Added Party and submits that the relationship between the two was contrived, in an effort to deny the Applicant her entitlement to survivor's benefits.

[11] In an undated document (at page 31 of her submissions), the Applicant wrote:

> "8. [The Deceased] left me November 1st 2007, when he moved to Espanola Ontario.
>
> . . .
>
> 17. I feel that I should receive the Canada Pension Surviving Spouse Pension as I was with "[the Deceased] for 31.5 years when he left; not counting anything after he left and the total would be still married is 36.6 years.

18. I feel that the common law spouse of only a few years should not get the pension.

. . .

19. I feel that payments should be given to me, as I was his nurse, maid, mother and wife through all the years of living together from 1975 until he left."

[12] The Office of the Commissioner of Review Tribunals received these same submissions on August 14, 2012, and they were before the Review Tribunal.

[13] The Applicant also provided extensive documentation. These include banking records, the Deceased's employment retirement package, court documents and Land Registry records. The banking records were part of the package of documents which the Applicant received at the hearing.

SUBMISSIONS of the RESPONDENT and ADDED PARTY

[14] Neither the Respondent nor the Added Party filed any written submissions to the leave application.

ANALYSIS

Late Filing of Application

[15] 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 her 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.

[16] The Applicant has satisfied me that there is a reasonable explanation to account for her delay in filing the leave application. It would have been reasonable for her to have been distracted by her father's attendance at the hospital that week.

[17] Given that the delay involved in filing the leave application is relatively brief – at only two days – and although she did not make any submissions regarding her intentions, I am prepared to accept that the Applicant had a continuing intention to pursue the application. Her letter is dated July 12, 2013, and she explained that her father had been in hospital that same week. I find also that there is no prejudice to either the Respondent or the Added Party in allowing the extension, as the delay involved here is brief.

[18] Even if one of the four criteria of the test is not satisfied, I may permit an extension of time for filing of the leave application: *Lavin v. Attorney General of Canada,* 2011 FC 1387. However, my view is that if the Applicant fails to satisfy me on the last of the four criteria - whether the matter discloses an arguable case - that generally I should be unprepared to exercise my discretion and extend the time for filing. I turn now to consider the Applicant's submissions regarding the last criteria, in the context of the leave application.

Application for Leave

[19] 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).

[20] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

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

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

[23] I am required to satisfy myself that 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, before leave can be granted.

(i) <u>Failure to Observe a Principle of Natural Justice</u>

[24] The Applicant does not state outright that the Review Tribunal failed to observe a principle of natural justice, but this can be inferred from her submissions. She submits that the Review Tribunal did not provide her with sufficient opportunity to review the documentation of the Added Party, as she received it only at the hearing and secondly, although the Review Tribunal offered her an adjournment of the proceedings, advised her that she might not have another in-person hearing. The Applicant did not want to be denied an in-person hearing, and therefore felt compelled to proceed on January 10, 2013, notwithstanding the fact that she felt she had insufficient time to review the Added Party's materials at that time.

[25] I note that the Added Party's materials were sent to the Applicant in advance of the hearing, but owing to holidays and delivery issues, she did not actually receive them prior to the hearing.

[26] The Added Party's documents consist of the following:

(a) Timeline written by the Deceased – gives a chronology of relationship between the Applicant and the Deceased for the years 2004 to 2006

(b) Direction re: title, dated May 28, 2009 – shows that the Added Party and the Deceased were joint tenants of property

(c) Letter dated May 29, 2009 to City of Greater Sudbury Tax Department – indicates that the Added Party and the Deceased had jointly purchased property

(d) Cambrian Insurance Memorandum of Provisional Insurance effective May 29, 2009 to May 29, 2010 - shows that the Added Party and the Deceased were both insureds under a policy of insurance

(e) Economical Insurance Group automobile account statement dated May 25, 2011 – indicates that the Added Party and the Deceased were joint policy holders under a contract of motor vehicle insurance

(f) Receipt for payment dated November 1, 2012 from Cambrian Insurance Brokers Ltd. to the Added Party and the Deceased

(g) Letter from Canada Trust dated January 9, 2012- shows that the Added Party and the Deceased were joint mortgagors

(h) E-mail from the Applicant's daughter dated December 2, 2012 – advises that the Added Party and the Deceased purchased a house together in 2009

(i) Letter dated December 2, 2012 from another daughter - advises that the Added Party and the Deceased resided together in the home they purchased together in 2009, and that the Added Party cared for the Deceased

(j) Funeral Director's Certificate of Death – lists the Added Party as the spouse.

[27] The Added Party's records were used by her to support her claim that she had been in a common-law relationship with the Applicant's spouse for a few years up to the time of his death.

[28] The Applicant rightly notes that some of these records were available for several years prior to the hearing and that the Added Party could have produced them early on. Late disclosure of records however does not necessarily result in a breach of the principles of natural justice.

[29] The Applicant does not explain why she is of the position that the Review Tribunal did not afford her a fair hearing, whether it was for reasons that she may have been denied an opportunity to call additional witnesses, conduct more vigorous cross-examination of the Added Party, obtain additional records, or other, in response to any matters raised in the Added Party's documentation. Apart from attacking both the relevancy and veracity of the Added Party's documents, the Applicant has not indicated how her submissions or response would have bolstered or differed from the case which she made or could have made at the Review Tribunal hearing, had she had the Added Party's materials well in advance of the Review Tribunal hearing. It is unclear from the Applicant's submissions how her case might have changed, what additional arguments she might have raised, what further cross-examination she might have conducted or what additional documentation she might have obtained and provided, and how they might have been germane, had she received the Added Party's materials early on.

[30] The Applicant provided a response to the Added Party's documentation in the form of written submissions to the Review Tribunal on January 15, 2013, in the days following the hearing. The Review Tribunal took what it described as the unusual step in accepting the Applicant's written submissions following the hearing. The Review Tribunal provided both the Respondent and Added Party with the opportunity to respond to the Applicant's written submissions. The Added Party's counsel prepared a written response by letter dated March 12, 2013.

[31] On the face of it, it appears that there was insufficient time and opportunity for the Applicant to respond at the hearing, as she filed additional materials well after the Review

Tribunal hearing. In addition to the documents she filed on January 15, 2013, the Applicant filed materials with her leave application, as well as on four subsequent occasions, as follows:

(a) 60 page facsimile dated August 19, 2013, received by the Tribunal on August 28, 2013, largely consisting of documentation regarding her court action against the Added Party (which was commenced after the Review Tribunal hearing), additional submissions and Land Registry records, the latter which overlaps with materials submitted with the leave application;

(b) Five page facsimile dated August 27, 2013 received by the Tribunal on August 28, 2013, advising that an Express Post Package with "further evidence" and Court transcripts were forthcoming;

(c) 24 pages received by the Tribunal on October 2, 2013, consisting of a transcript of proceedings of Small Claims Court on July 26, 2013, as well as a Statement of Death, banking records, temporary Court Order and document entitled, "4 Myths about common-law relationships – Canada CBC News, posted March 20, 2013". The transcript and article on common-law relationships had not been previously submitted by the Applicant;

(d) 18 pages received by the Tribunal with two separate submissions, both dated October 10, 2013. The package includes the Timeline prepared by the Applicant's spouse and the CBC article on common-law relationships. She again pointed out that the "early retirement package that her spouse signed on November 17, 2004 shows that *Canada Pension* survivor's benefits are to be [hers]". The Applicant submits that the court transcripts are evidence that the Added Party is not a credible witness. The Applicant submits that the banking records indicate that the Added Party could not have been residing with her spouse, if there was banking activity in another community after the time the Added Party purportedly began residing with the spouse.

(e) 50 pages received by the Tribunal on February 26, 2014, which include the following:

(i) Document entitled, "123 Questions for Canada Pension Plan Survivors Benefits, with 250 numbered points;

(ii) Letters dated January 10 and 28, 2014 addressed to Aboriginal Affairs and Northern Development Canada and e-mail exchange with Ministry of Finance; and

(iii) Various other records, some of which replicate existing materials filed with the Tribunal.

[32] The Applicant submits that these additional records call into question the nature of the relationship between the Applicant's spouse and the Added Party, and the length of time of their cohabitation.

[33] Ordinarily, in a leave application, I would not accept nor consider any new materials which were not before the Review Tribunal, given that the grounds of appeal which I may consider for a leave application are limited by subsection 58(1) of the DESD Act. That subsection does not permit me to consider the contents of any new records as the basis for a ground of appeal. However, in this instance, I will review the documents for a very limited purpose; I will not review them in the context of the substantive issues that were before the Review Tribunal, but will review them to determine if they could be used at an appeal to demonstrate that the Review Tribunal might have failed to observe a principle of natural justice. If the submissions or materials filed or proposed to be filed after the Review Tribunal hearing can be considered "new" – not only in form but in substance – then this could well support the Applicant's submissions that she did not have sufficient opportunity to respond to the Added Party's materials at the hearing itself.

[34] I cannot accede to the Applicant's submissions, however, as her extensive submissions accompanying and following the leave application appear to generally mirror those made by her at the Review Tribunal hearing and in her submissions of January 15, 2013, and the numerous records filed in August and October 2013 and February 2014, appear to duplicate

en masse records which she had already filed with the Office of the Commissioner of Review Tribunals and were before the Review Tribunal. I note that there was extensive documentation from the Applicant before the Review Tribunal; indeed, it described the Applicant's evidence as "overwhelming". From what I am able to determine, generally there is nothing substantively novel which the Applicant has raised or proposes to raise, in response to the disclosure of the Added Party's materials.

[35] The Small Claims Court transcripts and the CBC piece on common-law relationships are "new" documents, in that they were not in the Review Tribunal file at the hearing. However, while they are "new" they do not speak to the central issue before the Review Tribunal, namely, whether the relationship between the Added Party and the Deceased could be considered common-law for the purposes of the *Canada Pension Plan*. Here, the benefit which the Applicant seeks is conferred by the *Canada Pension Plan* and as such, the Applicant must meet the requirements of the *Canada Pension Plan.* Hence, the fact that the CBC piece delineates some of the common myths surrounding common-law relationships in different jurisdictions across Canada is of no relevance and of no probative value.

[36] In my view, the Small Claims Court transcripts, CBC piece and other voluminous materials either are not "new" or are irrelevant and of no probative value to the ultimate issue considered by the Review Tribunal. That being so, I am not satisfied that, based on the Applicant's leave application materials, the appeal has a reasonable chance of success.

[37] Significantly, the Review Tribunal took the "unusual step" of permitting the Applicant to file additional materials after the hearing. Thus, it cannot be said that the Review Tribunal did not provide her with a reasonable opportunity to respond to the Added Party's materials, even if it was at the Applicant's initiative. The Courts have determined that where an applicant has been provided with a "reasonable opportunity to submit her case" that will suffice: *Miller v. Attorney General of Canada*, 2007 FCA 237. I would also extend that to mean that a party should also be provided with a reasonable opportunity to defend or respond to the other party's case. Either way, there is no indefinite and ongoing right of response by a party, even if a line of argument might not have been pursued earlier,

if a party should have been alerted to the issue and could have responded to it earlier. The general positions of both the Respondent and Added Party were well documented, or at least, certainly well known to the Applicant.

[38] The Added Party filed three decisions of the Federal Court and Federal Court of Appeal. While it may have been professionally courteous of counsel to exchange authorities in advance of a hearing, the fact that they were produced at the outset of the hearing, rather than far in advance of the hearing, would have been no basis for adjourning the proceedings. As these are legal authorities, parties are expected to generally be or become aware of them. The Applicant has not indicated that she would have responded to these authorities had she been provided with copies prior to the hearing.

(ii) Error in Law

[39] The Applicant submits that the Review Tribunal committed an error in law in failing to follow a temporary court Order pronounced on June 21, 2007 by the Superior Court of Justice of Ontario. The Court ordered *inter alia* that the Deceased "shall maintain all benefits available to him through his past employer and/or pension plan for the benefit of the Respondent". The Applicant also notes that the Deceased had contemplated that she would receive *Canada Pension Plan* survivor's benefits in his employment retirement package.

[40] It appears that the pension plan and survivors benefits which are referred to in the temporary court Order as well as the employer's documentation mean those benefits made available through his employment, and not *Canada Pension Plan* survivor's benefits. Any entitlement to benefits which the Applicant may have to a private insurance scheme, such as an employee`s retirement benefits, is separate and distinct from those under the *Canada Pension Plan.*

[41] In any event, there is no authority of which I am aware which allows parties to supersede the *Canada Pension Plan* and frustrate another party's entitlement to the survivor's benefits that are provided by it. Hence, I am not satisfied that the appeal has a reasonable chance of success under this ground.

[42] While it does not form part of the initial leave application materials filed on July 17, 2013, the Applicant submits also that under Ontario family law proceedings, a couple cannot be considered common-law, when one of the parties remains legally married to another party, and when the couple has not been residing together for at least three years. The Applicant submits that the Review Tribunal erred in failing to follow Ontario legislation.

[43] While the Review Tribunal did not address these submissions, I find that they have no credence. Irrespective of whatever definition for a common-law relationship might exist in Ontario, or any other jurisdiction for that matter, the benefits which the Applicant seeks are statutorily derived, i.e. she must meet the requirements of that statute to qualify for those benefits which are conferred by statute.

[44] Paragraph 44(1)(d) of the *Canada Pension Plan* provides for survivor's benefits as follows:

> (d) subject to subsection (1.1), a survivor's pension shall be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period, if the survivor
>
> …
>
> (ii) in the case of a survivor who has not reached sixty-five years of age,
>
> (a) Had at the time of the death of the contributor reached thirty-five years of age …

[45] Subsection 42(1) of the *Canada Pension Plan* defines survivor in relation to a deceased contributor, to mean

> (a) If there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor's death, or
>
> (b) A person who was the common-law partner of the contributor at the time of the contributor's death.

[46] Subsection 2(1) of the *Canada Pension Plan* defines common-law partner, in relation to a contributor, to mean

(a) A person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor's death, the "relevant time" means the time of the contributor's death.

[47] The Review Tribunal accepted as evidence that the Added Party and the Deceased cohabited in a conjugal relationship since 2008, until the date of his death in June 2011, and determined as a consequence that the Added Party met the requirements of the *Canada Pension Plan.*

[48] The Applicant submits that she ought to be entitled to the survivor's benefits, on account of the fact that she remained legally married to the Deceased and had cohabited with him in a conjugal relationship for a substantially greater time. The fact that the Applicant had resided with the Deceased prior to marriage, had been married to him since 1975 and remained legally married to him for close to 36.5 years at the time of his death is of no relevance and takes no precedence over the rights and entitlement of the Added Party to survivor`s benefits under the *Canada Pension Plan,* even if the Added Party cohabited with the Deceased in a conjugal relationship for substantially less time than had the Applicant.

(iii) <u>Erroneous Finding of Fact</u>

[49] The Applicant submits that the Review Tribunal based its decision on numerous erroneous findings of fact. The Applicant submits that much of the evidence of the Added Party was false and misleading. Essentially, she is asking that I re-assess and re- weigh the evidence in her favour.

[50] In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Applicant's counsel in that case identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the Applicant's application for judicial review, the Court of Appeal held that,

> "First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second,

> assigning weight to evidence, whether oral or written, is the province of the trier of fact.
>
> Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact. . .”

[51] The Review Tribunal was permitted to consider the evidence before it and attach the weight it determined appropriate. It was also open to the Review Tribunal to assess the quality of the evidence and determine what facts, if any, to accept or disregard. If the Applicant is requesting that we re-assess all of the evidence, discount evidence which she submits undermines the Added Party’s position, and decide in the Applicant’s favour, I am unable to do this, as subsection 58(1) of the DESD Act requires that I determine whether any of the reasons she has cited fall within any of the enumerated grounds of appeal and whether any of them have a reasonable chance of success.

[52] Given these considerations, I cannot conclude that the Applicant has raised a ground upon which the appeal might have a reasonable chance of success.

CONCLUSION

[53] In summary, I find that the Applicant has not satisfied me that the appeal has a reasonable chance of success, and as such, I am not prepared to exercise my discretion to extend the time for filing, or to grant leave. The request to extend the time for filing is refused, as is the Application requesting leave to appeal.

Janet Lew
Member, Appeal Division