Citation: *A. B. v. Minister of Employment and Social Development*, 2014 SSTAD 319

Appeal No. AD-13-791

BETWEEN:

A. B.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

and

V. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: November 06, 2014

DECISION

[1] The Social Security Tribunal (the “Tribunal”) refuses leave to appeal.

BACKGROUND

[2] The Applicant seeks leave to appeal the decision of the Review Tribunal issued on January 29, 2013, denying her a survivor’s pension under the *Canada Pension Plan, (“CPP”).* The Applicant had sought to receive a survivor’s pension in respect of deceased contributor G. S. with whom she stated she cohabited in a common-law relationship for several years up to and prior to his death in April 2007.

[3] On or about April 09, 2013 the Applicant filed an Application requesting Leave to Appeal (the “Application”) with the Pension Appeals Board, which traversed the Application to the Tribunal.

GROUNDS OF THE APPLICATION

[4] In the cover letter to her Application, the Applicant states that she disagrees with the Review Tribunal decision. She stated she had applied to the Jamaica Immigration authorities for documents which could establish that the deceased contributor was in Jamaica as opposed to being in Canada with his ex-wife, the Added Party in this matter. The Applicant also expressed her disagreement with what she termed the Review Tribunal’s mischaracterisation of her relationship with the deceased contributor.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

Preliminary Issue

[6] A preliminary question that arose was whether the Application was filed within the 90 day time limit set out by the applicable legislative provisions. Initially, the Applicant completed an Application using the old Pension Appeals Board, (“PAB”), form. The date stamps on the Application show that the PAB received the Application on April 12, 2013 and

the Tribunal received the Application from the PAB on April 15, 2013. The Applicant made a subsequent and later filing of the Application documents to the Tribunal, however, this second filing could not be said to be a new filing and, therefore, no issue of late filing arises.

THE LAW

[7] The applicable statutory provisions governing the grant of Leave are ss. 56(1), 58(1), 58(2) and 58(3) of the *Department of Employment and Social Development Act, ("DESD Act*"). Ss. 56(1) provides, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" while ss. 58(3) mandates that the Appeal Division must either "grant or refuse leave to appeal." Clearly, there is no automatic right of appeal. An Applicant must first seek and obtain leave to bring his or her appeal to the Appeal Division, which must either grant or refuse leave.

[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".

ANALYSIS

[9] On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first, and lower one than that which must be met on the hearing of the appeal on the merits. However, to be successful, the Applicant must make out some arguable case[1] or show some arguable ground upon which the proposed appeal might succeed. In *St-Louis*[2]*,* Mosley, J. stated that the test for granting a leave application is now well settled. Relying on *Calihoo,*[3] he reiterated that the test is "whether there is some arguable ground on which the appeal might succeed." He also reinforced the stricture against deciding, on a Leave Application, whether or not the appeal would succeed.

[10] Subsection 58(1) of the DESD Act states that 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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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Canada (A.G.) V. St. Louis*, 2011 FC 492
[3] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD para 15.

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.

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

[12] In order to grant leave to appeal, the Tribunal is required to be satisfied that the appeal has a reasonable chance of success, however, this necessitates the Tribunal first determining whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal. Only then can the Tribunal assess the chance of success of the appeal.

[13] The Tribunal is not satisfied that the appeal has a reasonable chance of success. The matters put forward by the Applicant as the basis of her Application, do not relate to a ground of appeal or, if they do, the Tribunal finds that on the basis of the evidence that was before the Review Tribunal the appeal would likely not succeed. Merely disagreeing with the decision of a Review Tribunal does not point to any failure by the Review Tribunal to observe a principle of natural justice or an error of law, or that the Review Tribunal otherwise acted beyond or refused to exercise its jurisdiction. Nor does disagreeing with the Review Tribunal decision establish that the Review Tribunal made erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[14] As to the Applicant's disagreeing with the Review Tribunal's characterization of her relationship with the deceased contributor as not amounting to a relationship of common-law spouses as defined by CPP s. 2, while the Tribunal may have reached a different conclusion, it is satisfied that this was a conclusion that was open to the Review Tribunal to make. There was testimony that the deceased contributor divided his time between Jamaica and Canada, as well, there was some equivocation about the nature and purpose of the deceased contributor's sojourns in Jamaica. Accordingly, the Applicant has failed to satisfy the Tribunal that a successful appeal may be maintained on this basis.

[15] Furthermore, the Review Tribunal notes that the Applicant was unable to establish that, prior to his death, she had been cohabiting with the deceased contributor for a continuous period of at least one year. The deceased contributor having spent four months in Canada prior to his death in April 2007 meant that the Applicant could not establish continuous cohabitation for the four months immediately preceding the death of the deceased contributor. Accordingly, the Review Tribunal did not err when it found that the Applicant was not a spouse within the meaning of ss. 2(1) of the CPP and was not entitled to a survivor's pension.

CONCLUSION

[16] The Application is refused.

Hazelyn Ross
Member, Appeal Division