

Citation: *C. C. v. Minister of Employment and Social Development*, 2015 SSTAD 358

Appeal No: AD-13-631

BETWEEN:

C. C.

Applicant

and

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

Respondent

and

G. C.

Added Party

**SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision**

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: March 18, 2015

DECISION

[1] The Social Security Tribunal (the “Tribunal”) refuses the applications to extend the time for filing leave to appeal and refuses leave to appeal.

BACKGROUND

[2] By way of an Application requesting Leave to Appeal (the “Application”), the Applicant seeks leave to appeal the decision of the Review Tribunal issued on February 19, 2013. The Applicant also seeks an Order extending the time for making the Application.

[3] The decision from which the Applicant wishes to appeal determined that her application for a division of unadjusted pensionable earnings, (“DUPE”), was statute-barred. It also determined that she was not suffering from incapacity within the meaning of ss. 55.3 of the *Canada Pension Plan*, (“CPP”).

[4] The Social Security Tribunal, (“the Tribunal”), received the Application on June 19, 2013, whereas the Applicant ought to have filed the Application no later than May 20, 2013.

GROUND OF THE APPLICATIONS

The Late Application

[5] The Applicant states that her Application is not, in fact, late. She contends she made the initial Application to the Office of the Commissioner of Review Tribunals, (“OCRT”), well within the 90-day time limit. According to the Applicant, her May 2013 Application is, in fact, a second application.

The Application

[6] With regard to the Application itself, the Applicant pled that she has been misinformed about the DUPE; that changes occurred shortly after her divorce; that the legislation essentially discriminates against her. She also contends that by virtue of the conduct of a member of the Review Tribunal there was a reasonable apprehension of bias with respect to the Review Tribunal’s decision making. In the Applicant’s view, the Review Tribunal had prejudged her appeal.

ISSUES

- [7] The Tribunal must decide the following two issues.
- a) Is this an appropriate case in which the Tribunal should extend the time for filing the Application?
 - b) In the event that the Tribunal decides to grant the Application to extend the time for filing the Application, does the appeal have a reasonable chance of success?

THE LAW

Extending the Time Limit

[8] Applications to extend the time limit for filing leave applications are governed by ss. 57(2) of the *Department of Employment and Social Development, (DESD) Act*. The provision allows the Tribunal to extend the time for bringing an Application for Leave to Appeal while at the same time providing an upper limit of one year for bringing the application and, by analogy, for granting an extension to the time limit.

[9] The Applicant states that she sent her initial Application to the OCRT on April 29, 2013. She telephoned the OCRT on May 16, 2013 at which time she was informed that the OCRT no longer existed. She was unable to discover where her Application was. She was referred to the new Tribunal. The Applicant details a series of unsuccessful attempts to file an Application electronically with the Tribunal. It was some time after May 21, 2013 that she was able to make actual contact with the Tribunal at which time she obtained advice on how to proceed.

[10] The Tribunal file does contain a letter from the Applicant dated April 29, 2013. However, in this letter the Applicant states that she no longer wishes to pursue the Appeal. The Tribunal records show that this letter came from the OCRT. The Applicant insists that there is a second letter of the same date and that in this letter she indicates she wished to pursue an appeal. The Tribunal has no record of this second letter. Nor has the Applicant provided the Tribunal with a copy of this second letter or a fax transmission receipt regarding this letter. The Tribunal record contains only one letter from the Applicant specifically indicating her desire to continue with her appeal. This letter is dated April 29, 2014 and not April 29, 2013.

[11] The onus is on the party requesting an Order extending the time limit for making an Application to demonstrate that the party meets the common law test for granting the extension. The Federal Court set out the test in *Gattelaro*,¹ namely that in exercising the authority to extend the time limit for leave to appeal, a Tribunal Member must consider the following criteria:

- Whether there was a continuing intention to pursue the application or appeal;
- Whether the matter discloses an arguable case;
- There is a reasonable explanation for the delay; and
- Whether there is prejudice to the other party in allowing the extension

[12] Notwithstanding the Applicant's claim that she did make an Application on April 29, 2013, the Tribunal can find no evidence of such an Application. Counsel for the Respondent submits that the Applicant has not met her onus to provide a reasonable explanation for the delay and, therefore, the Application to extend time should be dismissed. The Tribunal concurs. The Applicant may well have had a continuing intention to pursue the appeal; however, she has not satisfied the Tribunal that there is a reasonable explanation for the delay. Accordingly, the Tribunal dismisses the Application for an Order extending the time limit for making an Application for leave to appeal the Review Tribunal decision of April 19, 2013.

ADDITIONAL REASONS

[13] Furthermore, the Tribunal is not persuaded that the Applicant has an arguable case. The Applicant applied for a DUPE of her former husband's pensionable earnings. The parties were divorced in 1986 with the divorce becoming final on May 7, 1986. At the time the parties divorced there was no automatic division of pension credits. The then legislation provided that an application for DUPE had to be made within thirty-six months of the date of the Decree Absolute of divorce. In the Applicant's case, she had to bring the application for a DUPE sometime before May 6, 1989. The Applicant made the application in September 2011.

[14] There are two circumstances under which the Applicant would be able to benefit from a DUPE. First, her former husband could agree to the DUPE, failing such agreement, establishing that she was incapacitated within the meaning of the legislation such that her Application could be backdated. Unfortunately for the Applicant, neither circumstance arose. Her former husband

¹ *Canada (Minister of Human Resources Development) v. Gattelaro*, 2005 FC 833

refused his consent; and on the medical and other evidence that was before it, the Review Tribunal was unable to find that the Applicant suffered from a mental or physical problem so severe as to render her incapable of forming the intention to apply for a DUPE during the applicable period.

[15] It is trite to say that the Applicant disagrees with the Review Tribunal's findings. However, the question of whether or not the application for a DUPE was statute-barred is a mixed question of fact and law, and, in the Tribunal's view, the same applies to the question of whether the Applicant meets the test for incapacity. Accordingly, a standard of reasonableness applies to the decision.

[16] The Tribunal finds that the decision is reasonable in that it demonstrates the existence of justification, transparency and intelligibility within the decision-making process. The application for a DUPE is clearly out of time as it was made well outside the thirty-six month time limit and the Applicant's former spouse does not consent to a DUPE. Furthermore, while the Applicant may have established periods of ill health during the years between the divorce became final and the date of her application for a DUPE, it was established that she had also returned to school and had worked, thereby removing the element of continuity that is required for a finding of "incapacity".

[17] Accordingly, the Tribunal finds that the Review Tribunal decision is reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law and the requirements of the CPP.

CONCLUSION

[18] The Application to extend the time for filing the Application for Leave to Appeal is refused.

[19] The Application for Leave to Appeal is refused.

Hazelyn Ross

Member, Appeal Division