Citation: *I. B. v. Minister of Employment and Social Development*, 2015 SSTAD 1387

Appeal No. AD-15-1076

BETWEEN:

I. B.

Applicant

and

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

Respondent

and

M. B.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 1, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated July 6, 015. The General Division conducted an in-person hearing in Hamilton, Ontario on July 3, 2015 and determined that the Applicant and Added Party were in a common-law relationship from 1983 to 2006 and that therefore the period of division of unadjusted pensionable earnings allowed would be from January 1983 to December 2005. The representative for the Applicant, a paralegal and court agent, filed an application requesting for leave to appeal on October 2, 2015. She raised a number of grounds. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[3] The representative submits that the General Division erred as follows:

(a) misapprehended the evidence relating to the nature of the relationship between the Applicant and the Added Party for the period after 1990;

(b) misapprehended "any communications and continued connections to the natural children of the Appellant and the Added Party, as being deemed as "co-habitation" for the purposes of the *Income Tax Act* and as such, followed through regarding the *Canada Pension Plan,* with respect to the division of unadjusted pensionable earnings (e.g. DUPE) of the Applicant";

[4] The representative filed additional documents which she submits is conclusive proof that after 1990, the Applicant was residing in a common-law relationship with someone other than the Added Party.

[5] The representative also raised evidentiary objections.

[6] The Social Security Tribunal provided a copy of the Application for leave to appeal to the Appeal to the Added Party and to the Respondent, but neither filed any written submissions.

ANALYSIS

[7] 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). 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 (Attorney General)*, 2010 FCA 63.

[8] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out 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;
>
> (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.

[9] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

a. Misapprehension of evidence

[10] The representative submits that the General Division misapprehended the evidence. The representative however did not directly set out what evidence the General Division allegedly may have misapprehended, though made a number of factual and legal submissions regarding the relationship between the Applicant and the Added Party. The representative also explained some of the factual findings made by the General Division. For

instance, the General Division found that the Applicant financially supported the Added Party by contributing to her dental practice and education; the representative explains that the Applicant assisted the Added Party so she could become self-sufficient, if she wished to remain in Canada or stay for any length of time, as this would overall benefit their children.

[11] The representative suggests that the General Division erred in failing to appreciate that when the Applicant and the Added Party stayed at the other's home, it was merely a cost-saving measure, as he or she was visiting from overseas. The representative submits that "at no point was any stay with the Added Party an attempt to reconcile or maintain a conjugal relationship of any kind".

[12] The representative also submits that the General Division erred when it did not assign any weight to tax documents filed by the Added Party in a foreign jurisdiction which indicate that she has been divorced since 1990, and instead found that the Added Party and the Applicant were in a common-law relationship up to 2006.

[13] If a party is going to allege that the General Division misapprehended the evidence, i.e. that it based its decision on erroneous findings of fact, then properly that party should identify the specific findings of fact alleged to be erroneous and identify what the specific evidence was (and where it can be found in the hearing file). Here, the General Division alluded to the fact that there was close to 500 pages of other documentary evidence, including written letters from the parties and official documentation from a variety of sources. There were also affidavits from both parties, which had been prepared for unrelated family court proceedings.

[14] The General Division indicated that it assessed a lot of conflicting evidence and came to its ultimate determination on the evidence it preferred. When the representative submits that there are merits for an appeal and then lists the supporting evidence, this falls short of suggesting that the General Division based its decision on any erroneous findings of fact. That evidence was before the General Division and appears to have been considered by it. The representative's submissions essentially amount to a request that the Appeal Division reconsider and re-assess the evidence, so that it might come to a different conclusion than had the General Division. This is beyond the parameters of the DESDA; subsection 58(1) of

the DESDA sets out very limited grounds of appeal that may be considered, and it does not provide for any reassessment of the evidence.

[15] The representative submits that there is a valid explanation why the Applicant financially supported the Added Party after 1990, and why they stayed with each other when they visited their children. The Applicant had the opportunity to provide these explanations at the hearing before the General Division; indeed, he explained, in part, that he provided some financial assistance to the Added Party as he wanted her to "get on her feet" (paragraph 15). Even had these explanations not been offered at the hearing before the General Division, the appropriate time to have done so would have been then, rather than on appeal or in a leave application. If I were to consider the explanations now, that would amount to a reassessment of the evidence.

[16] The representative suggests that income tax records filed by the Added Party in a foreign jurisdiction which indicate that she was divorced from the Applicant can be seen as conclusive evidence that the parties were no longer in a common-law relationship. The General Division was aware that the Added Party had in fact acknowledged that she and the Applicant divorced in 1983, but based on the evidence before it, determined that that alone was not conclusive evidence that the Applicant and Added Party remained separate and apart thereafter. Indeed, even the Applicant appears to tacitly acknowledge that the date of divorce alone is not conclusive evidence that the parties remained separate and apart, as he maintains the position that he and the Applicant finally separated in 1990 -- years after they had divorced.

[17] I am not satisfied that the appeal has a reasonable chance of success on this ground.

b. "New documents"

[18] The representative advises that the Applicant has now recovered all of his income tax and pension statements, along with other documents, from his university file, showing that since at least 1995, he has named another woman as his beneficiary and spouse. The representative has filed handwritten copies of the 1995, 1999 and 2000 T1 General income tax and benefit return, as well as a list of research and medical leaves taken by the Applicant

for the years 1986 to 2006, when he was a university professor. The representative advises that additional documents will be filed at some future date.

[19] The representative submits that in addition to considering these "new documents", the Appeal Division should also reconsider documents which had been previously filed with the Social Security Tribunal.

[20] While clearly these "new documents" are intended to support the Applicant's allegation that he was no longer in a common-law relationship with the Added Party after 1990, for the purposes of a leave application and the appeal, the documents should at least address the enumerated grounds of appeal under subsection 58(1) of the DESDA. The representative has not indicated how these additional facts and records might fall into or address any of the enumerated grounds of appeal. If she is requesting that we consider these additional documents, re-weigh the evidence and re-assess the claim in the Applicant's favour, I am unable to do so at this juncture, given that subsection 58(1) of the DESDA restricts the grounds of appeal. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine when the Applicant and the Added Party might have ceased to have been in a common-law relationship.

[21] If the representative has filed or proposes to file these additional facts and records in an effort to rescind or amend the decision of the General Division, the Applicant must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision, which in this case is the General Division. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division case has no jurisdiction to rescind or amend a decision based

on new facts, as it is only the Division which made the decision which is empowered to do so, which in this case is the General Division.

[22] The "new documents" do not raise nor relate to any grounds of appeal and I am therefore unable to consider them for the purposes of a leave application. I am not satisfied that the appeal has a reasonable chance of success on this ground.

c. Admissibility of documents before the General Division

[23] Finally, the representative submits that the General Division erred in admitting the documents of the Added Party, and in assigning weight to them, when (1) the Added Party was not present at the hearing and was not produced or otherwise made available for cross-examination on any statements made by her or on her documents, and (2) documents filed by the Added Party did not represent the "best evidence" available, in that they were merely copies, rather than original documents.

[24] It does not appear that the representative raised any of these objections prior to or during the hearing before the General Division. In *R. v. Daigle*, 1994 CanLII 214 (B.C.C.A.), the Court of Appeal for British Columbia relied upon *R. v. Kutynec*, (1992), 70 C.C.C (3d) 289 (Ont. C.A.), in determining that an appellant ought not to be allowed to raise an objection to the admissibility of evidence for the first time on appeal. In *R. v. Kutynec*, Finlayson J.A. said:

> Prior to the proclamation of the *Charter*, no one conversant with the rules controlling the conduct of criminal trials would have suggested that an objection to the admissibility of evidence tendered by the Crown could routinely be initiated after the case for the Crown was closed. **It is self-evident that objections to admissibility of evidence must be made before or when the evidence is proffered. (my emphasis)**

[25] The General Division is not bound by the strict or formal rules of evidence. Paragraph 3(1)(a) of the *Social Security Tribunal Regulations* requires the General Division to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. It is well-established also that rules about the admissibility of evidence at administrative tribunals are necessarily flexible and

case specific. Thus, it would have been well within the purview of the General Division to admit the Added Party's documents into evidence.

[26] I note also in any event that the General Division was cognizant of the difficulties and shortcomings posed by some of the records -- including those produced by the Applicant -- and that it necessarily sought to accord the appropriate amount of weight to these records. It determined "due to the noted discrepancies in oral and written submissions, that it would place a substantial reliance on official documents".

[27] I am not satisfied that the appeal has a reasonable chance of success on this ground.

APPEAL

[28] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division