Citation: ***N. H. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 134**

Date: December 3, 2015

File number: GP-13-144

GENERAL DIVISION - Income Security Section

Between:

N. H.

Appellant

and

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

Respondent

Decision by: Raymond Raphael, Member, General Division - Income Security Section

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a division of unadjusted pensionable earnings (DUPE) is dated April 30, 2012. The Respondent denied the application initially and, in a decision letter dated November 22, 2012, denied the application upon reconsideration. The Appellant appealed that decision to the Social Security Tribunal (Tribunal) on April 30, 2013 beyond the 90-day limit set out in paragraph 52(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[2] The Tribunal must decide whether to allow an extension of time for the Appellant to appeal pursuant to subsection 52(2) of the DESD Act.

THE LAW

[3] Under paragraph 52(1) (b) of the DESD Act, the Appellant had 90 days after the date the reconsideration decision was communicated to bring the appeal to the General Division of the Tribunal. The Tribunal can decide to allow further time for an Appellant to appeal pursuant to subsection 52(2) of the DESD Act.

[4] When deciding whether to allow further time to appeal, the Tribunal must consider and weigh criteria as set out in case law. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court states that the criteria are as follows:

a) the Appellant has demonstrated a continuing intention to pursue the appeal;

b) the matter discloses an arguable case;

c) there is a reasonable explanation for the delay; and

d) there is no prejudice to the other party in allowing the extension.

[5] The weight to be given to each of the Gattellaro factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204).

ANALYSIS

[6] The Tribunal finds that the appeal was filed after the 90-day limit. The Respondent's reconsideration decision was dated November 22, 2012 and her appeal was not received by the Tribunal until April 30, 2013.

[7] In deciding whether to allow further time to appeal, the Tribunal considered and weighed the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. The overriding consideration is that the interests of justice be served (*Canada (Attorney General) v. Larkman*, 2012 FCA 204).

Continuing Intention to Pursue the Appeal

[8] In her fax dated February 14, 2013 (which has been accepted as her notice of appeal received by the Tribunal on April 30, 2013) the Appellant states that she sent a letter dated November 28, 2012 on three occasions to Service Canada indicating that she wishes to appeal the reconsideration decision. The Appellant followed this up with her fax and she has diligently provided copies of requested information to the Tribunal. In April 2014 she completed a Hearing Information Form which confirmed her intention to proceed with the appeal.

[9] The Tribunal finds that the Appellant had a continuing intention to pursue the appeal.

Reasonable Explanation for the Delay

[10] The Appellant sent a letter dated November 28, 2012 to Service Canada on three occasions indicating her intention to appeal. She followed this up with a fax in February 2013, which was not received by the Tribunal until April 30, 2013.

[11] The Tribunal finds that the Appellant provided a reasonable explanation for the delay in filing the appeal.

Prejudice to the Other Party

[12] The Respondent's interests do not appear to be prejudiced. The Minister's ability to respond, given its resources, would not be unduly affected by an extension of time to appeal

Arguable Case

[13] Determining whether there is an arguable case does not involve determining the merits of the case. Whether there is an arguable case has been held to be akin to whether the case has a reasonable chance of success (*Zakaria* 2011 FC 136).

[14] Section 55(1) of the CPP provides that subject to certain conditions, where former spouses divorced after January 1, 1978 and before January 1, 1987, the application for a DUPE must be made within 36 months of the divorce, unless both former spouses agree in writing to the application being made after this time period.

[15] Section 55.1 (c) of the CPP provides that subject to certain conditions the application for a DUPE must be made within four years after the date on which the former common-law partners commenced to live separate and apart, unless both former common-law partners agree in writing to the application being made after this time period.

[16] The following facts are undisputed:

- The Appellant and the late R. H. were married on August 12, 1972.
- They obtained a decree nisi for divorce on February 10, 1976 and the divorce decree was made absolute on February 14, 1980. For the purposes of the DUPE application, they are considered to have been divorced on the date of the decree absolute.
- The Appellant and R. H. resumed cohabitation in January 1985 and continued to live together as common-law partners until October 1989.
- They did not resume cohabitation after October 1989.
- R. H. died on September 7, 1991.

- The Appellant did not apply for a DUPE until April 2012.

[17] The Appellant's DUPE application was made after both the three year time limit set out in s. 55 (1) for former spouses and the four year time limit set out in s.55.1 (c) for former common-law partners. Since R. H. is deceased he cannot waive the time limit.

[18] The Tribunal is sympathetic to the Appellant's circumstances and recognizes that her not receiving the DUPE, to which she would otherwise have been entitled, because of the time limitations is unjust.

[19] Unfortunately, the Tribunal is bound by the CPP provisions. It is not empowered to exercise any form of equitable power in respect of the appeals coming before it. It is a statutory decision-maker and is required to interpret and apply the provisions as they are set out in the CPP: *MSD v Kendall* (June 7, 2004), CP 21690 (PAB).

[20] The Tribunal has no authority to make exceptions to the provisions of the CPP nor can it render decisions on the basis of fairness, compassion, or extenuating circumstances.

[21] Regrettably, the Tribunal must conclude that there is no reasonable chance of the Appellant being eligible for a DUPE.

[22] The Tribunal finds that, based on the undisputed facts, there is not an arguable case on appeal.

CONCLUSION

[23] In consideration of the *Gattellaro* factors and in the interests of justice, the Tribunal refuses an extension of time to appeal pursuant to subsection 52(2) of the DESD Act.

[24] The Appellant has demonstrated a continuing intention to pursue the appeal, a reasonable explanation for the delay, and it does not appear that the Minister will be prejudiced should an extension of time be allowed. These factors favour allowing an extension of time to file a notice of appeal.

[25] Conversely, there is no arguable case before the Tribunal. This factor overrides the other factors since there is no purpose in allowing an extension of time to appeal where, on the basis

of the undisputed facts, there is no reasonable chance of success. It would not be in the interests of justice to allow an extension of time for an appeal that is bound to fail.

[26] An extension of time to appeal is refused.

Raymond Raphael
Member, General Division - Income Security