Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *C. L. v. Minister of Employment and Social Development*, 2016 SSTADIS 255

Tribunal File Number: AD-16-485

BETWEEN:

C. L.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

On Leave to Appeal

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 6, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated February 10, 2016. The GD conducted an in-person hearing on December 11, 2015 and determined that the Applicant was not eligible for a division of unadjusted pensionable earnings (DUPE or credit split) under the *Canada Pension Plan* (CPP) because her application was made more than four years from the date of separation from her former common-law spouse (Added Party).

[2] On March 30, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division (AD) an Application Requesting Leave to Appeal detailing alleged grounds for appeal.

[3] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[4] The Applicant submitted an application for a DUPE on April 12, 2006. In it, she indicated that her period of cohabitation with the Added Party ended on May 5, 2002.

[5] In September 2006, the Added Party advised the Respondent that he and the Applicant had lived together from September 28, 1996 to November 26, 2001, when they separated pursuant to a verbal agreement. He indicated that she continued to live in a spare room in his apartment until she left for Halifax in May 2002.

[6] The Respondent made several requests of the Applicant for additional information to support her claimed date of separation. In April 2007, it advised her that if no further documentation was received within 30 days, it would be assumed that the Applicant no longer wished to apply and the benefit would be denied.

[7] In a letter dated May 11, 2007, the Applicant advised the Respondent that she accepted November 26, 2001 as the separation date. On July 14, 2007, the Respondent denied the Applicant's application, advising her that she did not qualify for the credit split as she applied more than four years after the date of separation. The letter set out the requirements to request a reconsideration decision and indicated that such a request had to be made within 90 days.

[8] There was apparently no communication between the parties until November 23, 2009, when the Applicant contacted the Respondent and requested information on her application. She subsequently forwarded documents to support her prior claim that she and the Added Party cohabited until May 2002.

[9] On March 14, 2012, the Applicant applied for a DUPE for the second time, again claiming that her common-law union with the Added Party did not end until May 5, 2002.

[10] On July 5, 2012, the Respondent denied the second application because it was made more than four years from the date of separation. On August 20, 2012, the Applicant requested a reconsideration of the decision and on January 8, 2013 the Respondent issued a letter maintaining the denial.

[11] In January 2013, the Applicant called the Respondent to advise her that the second application was a continuation of the first application. The Respondent sent the Applicant a letter confirming its decision.

[12] In February 2013, the Applicant appealed the Respondent's reconsideration decision on the second application to the Office of the Commissioner of Review Tribunals. This appeal was transferred to the GD in April 2013.

[13] In its decision dated February 10, 2016, the GD found that the period of cohabitation between the Applicant and the Added Party ended for the purposes of the CPP on April 26, 2002. It also ruled that it did not have jurisdiction to address the 2006 application because it was never the subject of a reconsideration request or subsequent appeal. The GD was not convinced by the Applicant's evidence that she did not receive the Respondent's initial decision on her first application.

[14] The GD also found that the first and second applications were two separate applications. It was the second application, filed on March 14, 2012, that was the subject of the appeal. As it was filed more than four years after the date of separation, the GD dismissed the Applicant's appeal.

THE LAW

[15] Paragraph 55.1(1)(c) of the CPP provides that a division of unadjusted pensionable earnings shall take place, in the case of common-law partners, following the approval by the Minister of an application made by or on behalf of either former common-law partner if:

> (i) the former common-law partners have been living separate and apart for a period of one year or more, or one of the former common-law partners has died during that period, and,
>
> (ii) the application is made within four years after the day on which the former common-law partners commenced to live separate and apart or, if both former common-law partners agree in writing, at any time after the end of that four-year period.

[16] Subsections 55.1(2) of the CPP looks at the intention of the parties and reads:

> (2) For the purposes of this section,
>
> (a) persons subject to a division of unadjusted pensionable earnings shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other;

[17] Subsection 2(1) of the CPP defines a "common-law partner" as a person who is cohabitating with the contributor in a conjugal relationship at the relevant time, and having so cohabitated for a continuous period of at least one year.

[18] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the AD may only be brought if leave to appeal is granted and the AD must either grant or refuse leave to appeal.

[19] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[20] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

[21] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] 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.*[2]

[22] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[24] In her Application Requesting Leave to Appeal, the Applicant makes the following allegations:

(a) In its decision, the GD discriminated against her in accepting the Respondent's determination of her date of separation, which was based on a lie.

(b) At the hearing, the GD did not question the Added Party about the misrepresentations he made in his letter of September 6, 2006.

The Applicant submitted numerous documents with her Application Requesting Leave. On inspection, all but one were before the GD. The exception was a letter from the Applicant dated

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC)
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

February 19, 2016 to the Regional Director of Service Canada requesting an investigation into the alleged mishandling of her file. The letter contained numerous allegations against officials employed by the Respondent, but it also criticized the GD as follows:

(c) Even though the GD disagreed with the Respondent's determination of the date of separation, it found that her first application had expired without studying the file.

(d) The GD considered her second application to be a separate application rather than a continuation of her first application, when the regulations clearly state that second applications are not permitted.

ANALYSIS

[25] The Applicant alleges that the GD "discriminated" against her in accepting the Respondent's determination of her date of separation, which she claims was based on a misrepresentation put forward by her former common-law spouse. I will assume that by using the word "discriminated," the Applicant is not alleging any bias on the part of the GD but is asserting only that she was treated unfairly. Bias is a serious allegation that suggests prejudgment based on factors extrinsic to the merits of a case, and the Applicant has furnished no evidence of this. There is nothing on the record to indicate the GD's conduct of the appeal breached any principle of natural justice.

[26] The Applicant submits that the GD did not question the Added Party at the hearing about alleged lies contained in his September 6, 2006. Whether or not this is strictly true, I note that paragraph 53 of the decision documents what appears to be fairly expensive questioning of the Added Party on the issue of when he and the Applicant ceased to cohabit as common-law partners. In any case, the fact is that the GD ultimately did *not* accept the position of the Added Party (which was also adopted by the Respondent) that the date of separation was November 26, 2001; instead, having considered the available evidence, the GD determined that it was more likely the two parties ceased to be common-law partners as of April 26, 2002. It is worth noting that this finding would have qualified the Applicant for a credit split had her first

application still been active, as it was submitted under the four-year time limit specified in paragraph 55.1(1)(c) of the CPP.

[27] However, the first application was not active. This brings us to another ground of appeal raised by the Applicant: the GD's finding that the first application was extinguished and had not been extended by the second application. In this case, the 2006 application was formally denied by the Respondent in May 2007. As noted by the GD, the Applicant was advised to request reconsideration within 90 days of receipt of the denial (pursuant to subsection 81(1) of the CPP), but more than two years passed before she was heard from again. Although the Applicant insisted that she had never received the letter of denial, the GD found this unlikely, and there was nothing in the submissions to suggest otherwise. Section **82 of the CPP** suggests that an appeal to the GD is permissible only if the Respondent has made a decision in response to a reconsideration request, and that did not occur following the first application.

[28] After the Respondent closed its file on the first application, it appears an official of the Respondent suggested that the Applicant submit a second application. Contrary to the Applicant's submissions, there is nothing in the legislation or regulations that forbids a second application, nor is there any mechanism in the law by which a second application can extend or "date protect" a defunct first application. I see no error in law or fact in the GD's determination that there was no choice but to hear the appeal on the second application of March 2012. As noted, this application came nearly ten years after the April 26, 2002 date of separation, as found by the GD.

[29] The decision of the GD indicates that it assessed a volume of conflicting evidence before coming to its ultimate conclusion. As mentioned, nearly all of the documents submitted with the Application for Leave to Appeal were already before the GD and presumably considered by it. In my view, the thrust of the Applicant's submissions amounted to a request that the AD reconsider and reassess the evidence, so that it might come to a different conclusion than had the GD. This is beyond the parameters of the DESDA, which in subsection 58(1) sets out very limited grounds of appeal. Nowhere does it provide for a hearing *de novo*.

[30] The Applicant has also suggested that the Respondent committed administrative errors in the way it managed her file. Even if this is true, neither the GD nor AD can provide a remedy.

In this case, the Respondent, in its discretion, saw fit not to take appropriate remedial action, and it is not the role of the GD or AD to step in and vary that decision. The Applicant was in effect asking the GD and AD to exercise fairness by deeming her DUPE application to have been received within the four-year time limitation. Unfortunately, neither the GD nor AD has the discretion to do such a thing and can only take an action that might have otherwise been taken by the Minister. This interpretation has been amplified by, among other cases, *Pincombe v. Canada*[3], which held that an administrative tribunal is not a court but a statutory decision-maker

and therefore not empowered to provide any form of equitable relief.

[31] In the end, I must conclude that the Applicant has put forward no grounds that carry a reasonable chance of success on appeal.

CONCLUSION

[32] The application for leave to appeal is refused.

Member, Appeal Division

[3] *Pincombe v. Canada (Attorney General)*, [1995] F.C.J. No. 1320 (F.C.A.) (QL)