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

Citation: *S. B. v. Minister of Employment and Social Development*, 2016 SSTGDIS 72

Tribunal File Number: GP-15-4446

BETWEEN:

S. B.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Pierre Vanderhout

DATE OF DECISION: September 14, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* survivor's pension (on her behalf) and a *Canada Pension Plan* children's benefit (on behalf of her children) in connection with the death of E. P. (the "Contributor"). The Respondent denied the application initially and, in a decision letter dated September 2, 2015, denied the application upon reconsideration. The Appellant appealed that decision to the Tribunal on June 17, 2016, 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.

ANALYSIS

[3] The Tribunal finds that the appeal was filed after the 90-day limit. The Respondent's reconsideration decision was dated September 2, 2015. While the Appellant states that she received the reconsideration decision on January 3, 2015, that is clearly impossible. The Tribunal assumes that the reconsideration decision was sent to the Appellant by mail and takes judicial notice of the fact that mail in Canada is usually received within 10 days. However, the 10th day after September 2, 2015 would have been a Saturday. The Tribunal therefore finds that the reconsideration decision was communicated to the Appellant by Monday, September 14, 2015, being the next working day after September 12, 2015. In accordance with paragraph 52(1)(b) of the DESD Act, the Appellant would normally have had until December 13, 2015 to file an appeal. However, as that was a Sunday, the Tribunal finds that the Appellant would have had until Monday, December 14, 2015 to file an appeal.

[4] The Appellant filed an incomplete appeal on December 1, 2015, within the 90-day appeal period. In a letter dated December 31, 2015, the Tribunal stated that the Appellant's appeal was incomplete as she failed to provide the Tribunal with a copy of the reconsideration

decision being appealed, the date that the reconsideration decision was received, her Social Insurance Number, and a signed declaration. On January 26, 2016, the Tribunal received multiple documents from the Appellant. However, the Tribunal wrote to the Appellant on January 28, 2016 and advised that the appeal remained incomplete as the reconsideration decision had not been included. On February 16, 2016, the Appellant and a Tribunal staff member discussed the deficiency by telephone.

[5] On March 30, 2016, the Appellant called the Tribunal for a status update and was told that the reconsideration decision had still not been received. The Tribunal staff member re-referred the Appellant to the Respondent so that she could request another copy of the reconsideration letter from the Respondent. On June 3, 2016, the Respondent sent some documents to the Appellant. Finally, on June 17, 2016, the Appellant filed the reconsideration decision with the Tribunal, at which time the appeal was complete.

[6] 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

[7] The Appellant did submit an incomplete appeal within the 90-day appeal period. She then submitted additional appeal materials immediately after being notified of the deficiencies with her original appeal materials. Upon being advised at some point after January 28, 2016 of the still-outstanding reconsideration decision, she then contacted the Tribunal on both February 16, 2016 and March 30, 2016 for clarification. At some point after March 30, 2016, she contacted the Respondent in order to get a copy of the reconsideration decision; this appears to have been sent to her on June 3, 2016 and upon receipt she immediately forwarded that document to the Tribunal.

[8] In reviewing the above sequence of events, it appears that the Appellant acted relatively diligently in each instance where action from her was required. There is no evidence to suggest that she ever lost interest in pursuing the appeal. In fact, the materials received from her on

January 26, 2016 included new documentation pertaining to the Contributor's work history. As the Appellant was reasonably diligent in pursuing the appeal up to the time a notice of appeal was filed, the Tribunal finds that the Appellant had a continuing intention to pursue the appeal.

Arguable Case

[9] In this case, the Contributor was born on X X X and died on September 23, 2010. He turned 18 on X X X. This means that his contributory period would have started in August of 1995 and ended in September of 2010. According to s. 44(3) of the *Canada Pension Plan*, the contributory requirement for CPP Survivor's and Children's benefits is met when the deceased contributor has made sufficient contributions to the Plan for not less than the minimum qualifying period. This occurs when the deceased contributor makes contributions for at least ten years or during at least one-third of the number of calendar years in their contributory period.

[10] In turn, s. 52(3) of the *Canada Pension Plan* sets out when a contribution is deemed to have been made. This happens when the deceased contributor's unadjusted pensionable earnings exceed his basic exemption for the year. It follows that a deceased contributor is deemed to have made no contribution for any year in which his unadjusted pensionable earnings do not exceed his basic exemption for that year.

[11] For this Contributor, there were 16 calendar years in his contributory period: this would include both 1995 and 2010 as well as the 14 full calendar years between 1995 and 2010. To meet the contributory requirement for the Survivor's and Children's benefit under s. 44(3) of the *Canada Pension Plan*, it is therefore necessary for the Contributor to have made valid CPP contributions in any six years from the month after the Contributor's 18th birthday to the month of death. In order to be successful in her appeal to the Tribunal, the Appellant would have to establish that there were at least six years of such contributions or that there were fewer than 16 years in the Contributor's contributory period.

[12] The Record of Earnings ("ROE") in the Tribunal file reveals that the Contributor had only five years (1995, 1999, 2002, 2006 and 2007; hereafter referred to as the "Valid Contribution Years") where his unadjusted pensionable earnings exceeded the basic exemption

for that year. The Contributor is therefore deemed to have made contributions to the Canada Pension Plan for only those five years. There were other years in which the Contributor had income, but his unadjusted pensionable earnings did not exceed the basic exemption for those years. Thus, unless the Appellant maintains that there is an error with respect to the contributory period or the unadjusted pensionable earnings shown in the Contributor's ROE, there does not appear to be an arguable case. In this case, the Appellant has not suggested that there is an error with respect to the calculation of the contributory period. However, the Appellant has explicitly stated that the Contributor was employed in years other than the Valid Contribution Years.

[13] This suggestion of employment outside of the Valid Contribution Years was supported by a resume that appears to have been prepared by the Contributor when he was still alive and which suggests that the Contributor did in fact work outside of the Valid Contribution Years. This is also supported to some extent by the ROE, which shows that the Contributor did have other years of employment in which his earnings did not exceed the basic exemption.

[14] The mere fact that a person was employed during a particular calendar year does not establish that their unadjusted pensionable earnings exceeded the basic exemption for that year. Furthermore, the resume does not disclose the quantum of earnings nor does it indicate the Contributor's wage, salary, or actual hours worked for any of the positions he held. However, it is not the Tribunal's role at this interlocutory stage to weigh competing evidence. The Appellant's submissions and the Contributor's resume can reasonably be interpreted as challenging the validity of the ROE. While the Appellant certainly appears to face an uphill battle in establishing a sixth year of valid contributions, based on the evidence filed, it does appear that she would at least be able to make an argument about it. The Tribunal distinguishes this scenario from *G. C.* v. *Minister of Employment and Social Development*, 2016 SSTADIS 1, in which the contribution shortfall was similar but the claimant accepted the validity of the ROE.

[15] Accordingly, the Tribunal finds, based on the Appellant's submissions and the evidence on file, that there is an arguable case on appeal.

Reasonable Explanation for the Delay

[16] While the Appellant did not provide a specific explanation from the delay, an explanation can be inferred from her actions. She first filed an appeal with Respondent rather than the Tribunal and then submitted documents to the Tribunal on two separate occasions that did not fully meet the appeal requirements. She then contacted the Tribunal on two additional occasions for clarification and eventually contacted the Respondent to get a copy of the reconsideration decision. The Appellant had previously received legal assistance but the lawyer's mandate was limited to requesting a reconsideration of the Respondent's initial denial. The Appellant had to handle the Tribunal appeal on her own and, in fact, appears to have relied on that lawyer's instructions in initially filing her appeal with the Respondent rather than the Tribunal.

[17] The Tribunal accepts that the Appellant's delay in filing the appeal can be attributed to her difficulty with the procedural requirements. It is clear that she wanted to file a complete appeal much earlier than she did. The only substantial delay was between her receipt of the Tribunal's January 28, 2016 letter and the June 17, 2016 filing of the reconsideration decision. However, even during this delay, she contacted the Tribunal twice and communicated with the Respondent in order to get another copy of the reconsideration decision. The Tribunal finds that the Appellant had a reasonable explanation for the delay in filing the appeal.

Prejudice to the Other Party

[18] The Respondent's interests do not appear to be prejudiced given the short period of time that has lapsed since the reconsideration decision. The Minister's ability to respond, given its resources, would not be unduly affected by an extension of time to appeal.

CONCLUSION

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

Pierre Vanderhout
Member, General Division - Income Security