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

Citation: *R. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 436

Tribunal File Number: AD-16-472

BETWEEN:

R. S.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: November 16, 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 December 22, 2015. The GD had earlier conducted an in-person hearing 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 (i) a credit split had already been previously effected and (ii) her application was made more than four years from the date of separation from her former husband.

[2] On March 24, 2016, the Applicant filed an incomplete application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal. Following a request from the AD for further information, the Applicant perfected her application for leave on June 16, 2016, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

ISSUE

[3] I must decide if an extension of time to make the Application for Leave should be granted.

THE LAW

DESDA

[4] Pursuant to paragraph 57(1)(b) of the DESDA, an application for leave to appeal must be made to the AD within 90 days after the day on which the decision was communicated to the Applicant.

[5] The AD must consider and weigh the criteria as set out in case law. In *Canada (MHRD) v. Gattellaro*,[1] the Federal Court stated that the criteria are as follows:

(a) The Applicant must demonstrate 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.

[6] 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 (A.G.) v. Larkman.*[2]

[7] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted. The AD must either grant or refuse leave to appeal. 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.

[8] According to subsection 58(1) of the DESDA 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.

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883

[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204

[9] 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.

[10] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success.[3]

CPP

[11] 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.

[12] Subsection 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;

[13] 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.

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[3] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (A.G.)*, 2010 FCA 63

APPLICANT'S SUBMISSIONS

[14] On March 24, 2016, the Applicant submitted to the AD a form entitled "Notice of Appeal to the Social Security Tribunal (SST) – General Division" — 85 days after she claimed to have received the GD's decision at her residential address of record. She was notified that she had used the incorrect form and asked to provide detailed reasons why she felt her appeal had a reasonable chance of success under the three grounds categorized in subsection 58(1) of the DESDA. Following at least two telephone conversations with AD staff, the Applicant provided additional information by way of letter, and her application for leave was deemed complete.

[15] That letter, dated June 16, 2016, explained in more detail her reasons for appealing, which I summarize as follows:

(a) A number of documents submitted to the GD indicated a fraud perpetrated by her former husband, but it did not take them into consideration. For example, in one such document, HRDC Client Profile (GD1-15), the Applicant alleged there were numerous errors:

- The Client Identifier was incorrect, with two client ID numbers, suggesting that someone was fraudulently collecting money from taxpayers in her name.
- There were two dates of birth listed, 1945-07-15 and 1945-07-29 (the latter being correct);
- Her country of origin was listed as Germany; in fact, she was born in Slovenia;
- Her gender was listed as "unknown."

(b) Other documents showed that the Canada Revenue Agency made payments (CRA) under her name to an imposter as early as 1992. The routing information revealed that payments were going to her spouse the entire time. These were not considered in the initial finding. At GD1-41-42 her son's name was listed twice as if he were two people, each listed with different ages. Page GDl-45 shows the

effective year this fraud began was in 1966, one year before she even came to Canada, when claims began being made under her name. She only found out about the fraud after receiving a letter from CRA in May 2010, indicating inaccurate information about her family ties and residency status. She uncovered the fraud following an investigation that included a lengthy court process to release documents.

(c) The Applicant also believes there were issues of natural justice at play. Records from Health and Welfare Canada (GD2-196 to GD2-202) explain how she became disabled. As per legislation, she was found to be severely mentally disabled and was unable to exercise her natural legal rights. She argues that it is unfair that the Canadian Government did not protect her and provide her with an opportunity for recovery, in the form of an extension of time, until a follow-up had been completed regarding her mental health.

[16] The Applicant also submitted many documents with her application for leave, nearly all of which were duplicates of records and correspondence that were before the GD at the time of hearing.

ANALYSIS

[17] I find that the application for leave to appeal was filed after the 90-day limit. My review of record indicates that the Applicant was late in completing her application, and did not provide required information to the AD until June, 16 2016, nearly three months after the submission deadline.

[18] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[19] The record indicates that the Applicant responded to the GD's decision within the 90-day deadline and was thereafter in regular contact with the SST until she completed her appeal.

As this process not occupy a great deal of time, I am willing to give the Applicant the benefit of the doubt on this factor and find that she had a continuing intention to pursue the appeal.

Reasonable Explanation for the Delay

[20] The Applicant did not explicitly offer any explanation for the delay in completing her application for leave, although she has mentioned in her recent communications with the AD that she was attempting to secure Legal Aid-funded representation to assist her with her appeal.

[21] In all, I find there was a reasonable explanation for the delay.

Arguable Case

[22] The Applicant submits that the GD failed to consider evidence that her former husband fraudulently used her personal information to create a second identity for the purpose of collecting benefits to which he was not entitled. Having reviewed the GD's decision against the material that was before it at the time of hearing, I see no arguable case on this ground.

[23] The GD, correctly in my view, narrowed the issues to those raised by the Respondent's denial of the second DUPE application dated April 22, 2013 and found no evidence that her former husband's pension credits for the years between 1985 and 1987 were inaccurate. Subsection 97(1) of the CPP does not deem old Records of Earnings infallible, but it does impose a strong presumption that they are accurate after four years have elapsed, and the GD appears to have appreciated the implication of the law as written. Its decision indicates that the GD did not merely dismiss the Applicant's allegations of fraud but gave them due consideration, addressing the supposed discrepancies before concluding there was nothing to overturn the accuracy presumption.

[24] 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*.

[25] In the end, I must conclude that the Applicant has put forward no grounds that have an arguable case on appeal.

Prejudice to the Other Party

[26] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

CONCLUSION

[27] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. The Applicant appears to have had a plausible explanation for submitting a complete application for leave to appeal nearly three months late, and it could be reasonably presumed that she had a continuing intention to pursue her appeal, despite the delay. It is also true that the Respondent's interests would not likely be prejudiced by extending time. Although three of the four *Gattellaro* factors were in her favour, they were ultimately overwhelmed, in my estimation, by the Applicant's lack of an arguable case: I saw no grounds—whether an error in fact or law or a lapse in natural justice—on which she would have a reasonable chance of success on appeal. Although the AD has the authority to allow an extension in some circumstances, careful consideration of the applicable legal criteria has led me to conclude that this is not an occasion to exercise that discretionary power.

[28] In consideration of the *Gattellaro* factors and in the interests of justice, I would refuse an extension of time to appeal pursuant to subsection 57(1) of the DESDA.

Member, Appeal Division