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

Citation: *A. B and M. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 114

Tribunal File Number: AD-16-1180
AD-16-1181

BETWEEN:

A. B.
M. B.

Applicants

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: March 23, 2017

REASONS AND DECISION

DECISION

An extension of time to appeal and leave to appeal are granted.

INTRODUCTION

[1] This is a request for leave to appeal decisions of the General Division of the Social Security Tribunal of Canada (Tribunal), both dated May 16, 2016, and both of which determined that the Tribunal had no jurisdiction to consider whether the Respondent was justified in terminating the Applicants' disabled contributor's child's benefits (DCCB) and demanding recovery of what it deemed were overpayments.

JOINING OF APPLICATIONS

[2] As these two requests for leave to appeal share a common question of law (with only immaterial differences in their respective facts), I think it appropriate to deal with them jointly, as permitted under section 13 of the *Social Security Tribunal Regulations*. In taking this action, I am satisfied that no injustice will be caused to any party.

BACKGROUND

[3] The Applicants are brother and sister. A. B. (A. B.) was born in March 1991 and M.-B. (M. B.) was born in January 1993.

[4] The position of the Applicants is that H. B. is their father and that he is married to their mother, J. B.

[5] H. B. immigrated to Canada in June 1996, and applied for Canada Pension Plan (CPP) disability benefits in March 2001. The Respondent approved his application in October 2001.

[6] In April 2002, J. B. applied for the DCCB on behalf of the Applicants. She claimed that H. B., the disabled contributor, was their father. The Respondent approved this application, with the children's benefits payable to J. B.effective January 2001.

[7] In April 2008, the Respondent commenced an investigation to determine whether H. B. was the father of the children for whom J. B. was receiving the DCCB. In October 2012, following a series of interviews and a detailed review of the available documentation, the Respondent's Integrity Services Branch concluded that the birth and marriage certificates provided by the Applicants were likely fraudulent. In separate letters dated November 7, 2012, the Respondent notified the Applicants that they had failed to prove they were H. B. children. A. B. and M. B. were advised that that they had been overpaid the sums of $5,437 and $3,751, respectively, for the periods in which they had been enrolled in school over the age of 18.

[8] The Respondent denied the Applicants' requests for reconsideration, and they appealed to the General Division on September 17, 2013. Following a hearing by way of written questions and answers, the General Division issued a decision, dated May 16, 2016, in which it determined that it could not consider the Applicants' entitlement to the DCCB because it lacked jurisdiction to hear the appeal. It cited a line of cases, beginning with *Pincombe v. Canada (A.G.),*[1] that suggest the General Division was barred from entertaining appeals from a discretionary decision of the Respondent to take, or decline take, remedial action under subsection 66(4) of the CPP.

ISSUES

[9] There are two questions to be answered at this stage:

- Should an extension of time to file the application for leave be granted?
- Does the appeal have a reasonable chance of success?

[10] The answer to the first question depends, in part, on the answer to the second.

THE LAW

Department of Employment and Social Development Act

[11] Under paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA), which came into effect on April 1, 2013, an appellant has 90 days to bring their

[1] *Pincombe v. Attorney General of Canada*, [1995] F.C.J. No. 1320.

appeal to the Appeal Division. The Appeal Division can decide to allow further time for an appellant to appeal pursuant to subsection 57(2), but in no case may an appeal be brought to the General Division more than one year after the day on which the Respondent's reconsideration decision was communicated to the appellant.

[12] According to subsections 56(1) and 58(3) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal." Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[13] 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (c) The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[14] 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.

[15] 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 — *Canada (MHRD) v. Hogervorst*; *Fancy v. Canada (A.G.).*[2]

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[2] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

Canada Pension Plan

[16] Section 44(1) of the CPP provides that a DCCB shall be paid to each child of a disabled contributor subject to certain conditions.

[17] Section 42(1) of the CPP defines a child of a contributor to include a natural child of the contributor; a child who was legally adopted, or adopted in fact by a contributor while the child was under 21; or a child of whom, either legally or in fact, the contributor had custody and control before the child was 21 years old.

[18] Section 42(1) of the CPP also defines a contributor's child to mean a child who is less than 18 years of age, as well as a child between 18 and 25 who is in full-time attendance at a school or university as defined by regulation.

[19] Subsection 66(1) of the CPP provides that "[a] person or estate that has received or obtained by cheque or otherwise a benefit payment to which the person or estate is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person or estate is entitled, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be."

[20] Subsection 66(2) of the CPP provides that "[i]f a person has received or obtained a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, the amount of the benefit payment or the excess amount, as the case may be, constitutes a debt due to Her Majesty and is recoverable at any time in the Federal Court or any other court of competent jurisdiction […]."

[21] Subsection 66(4) of the CPP provides that if the Minister (for the purposes of this appeal, the Respondent) is satisfied that, as a result of erroneous advice or administrative error, a person has been denied

(a) a benefit to which that person would have been entitled,

(b) a division of unadjusted pensionable earnings, or

(c) an assignment of a retirement pension,

the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in had the erroneous advice not been given or the administrative error not been made.

[22] Section 75 of the CPP provides that where a DCCB is payable to the child of a disabled contributor, the payment shall be made to the person having custody and control of the child if the child has not reached the age of 18 years.

[23] Subsection 76(1) of the CPP states that a DCCB ceases to be payable with the payment for the month in which

> (a) the child ceases to be a dependent child;
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> (b) the child dies;
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> (c) the contributor's disability benefit ceases to be payable;
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> (d) the child is adopted legally or in fact by someone other than the disabled contributor or the disabled contributor's spouse or common-law partner, unless the disabled contributor is maintaining the child, as defined by regulation; or
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> (e) the disabled contributor ceases to have custody and control of the child, where the child is a child as defined in subsection 42(1) by reason of the disabled contributor having had such custody and control.

[24] Section 52 of the *Canada Pension Plan Regulations* (CPP Regulations) sets out information and evidence that the Minister may request for the purpose of determining an applicant's eligibility for a benefit, the amount that an applicant is entitled to receive as a benefit, or a beneficiary's eligibility to continue to receive a benefit. The information and evidence that may be requested includes whether a disabled contributor's dependent child is his child.

[25] Section 59(1) of the CPP Regulations provides that

> where evidence is required under the Act or these Regulations to determine the eligibility or continuing eligibility of any beneficiary to receive any amount payable as a benefit and where the Minister has requested such evidence and the

> beneficiary has not complied with the request or the Minister is not satisfied with the evidence furnished by that beneficiary, the Minister may, on 30 days written notice, withhold payment of the benefit until such time as the beneficiary has furnished the evidence and the Minister is satisfied as to the eligibility of that beneficiary to receive benefits.

Gattellaro

[26] In deciding whether to allow further time to appeal, an administrative tribunal must weigh the four factors set out in *Canada (MHRD) v. Gattellaro*[3]:

(a) Does the Applicant demonstrate a continuing intention to pursue the appeal?

(b) Is there a reasonable explanation for the delay?

(c) Would the other party suffer prejudice in allowing the extension?

(d) Does the matter disclose an arguable case?

[27] 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*.[4]

APPLICANT'S SUBMISSIONS

[28] In their applications requesting leave to appeal, the Applicants stated that the General Division erred by basing its decision on "hypo-technical" grounds of jurisdiction. After the Respondent notified the Applicants that they were ineligible for the DCCB and demanded repayment of past benefits, it advised them that they had the right to appeal the decision to the Income Security Section of the Tribunal. The Applicants duly appealed to the General Division and submitted written answers to questions from the presiding member. Nowhere was it ever communicated to the Applicants during this process that they were appealing to the wrong forum. The General Division did not assess the large volume of documentary evidence that the Applicants produced to show they were the disabled contributor's children; only at the tail end

[3] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[4] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

of the proceedings did the General Division inform them that the matter was beyond its jurisdiction.

ANALYSIS

[29] I find that both applications requesting leave to appeal were filed after the 90-day limit. The General Division's decisions were sent to the Applicants at their common residential address in India on May 16, 2016, and their requests for leave to appeal were received by the Tribunal on October 5, 2016—141 days later and after the 90-day deadline set out in subsection 57(1) of the DESDA. In their requests for leave, neither Applicant claimed that they did not receive the decisions until August 2, 2016, and they offered no reasons for the delay in delivery.

[30] 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

[31] The Applicants, along with their mother, have been subject to investigations by the Respondent into their entitlement to the DCCB for more than eight years. The record shows that since 2012, when they first learned that the Respondent was seeking repayment, the Applicants have assiduously defended their claims and pursued all recourse available to them. As they were late in filing their requests for leave by just over a month (presuming a typical delivery time of 10 days), I am willing to give the Applicants the benefit of the doubt on this question and find that they had continuing intentions to pursue their appeals.

Reasonable Explanation for the Delay

[32] Although the form to request leave to appeal specifically asks for an explanation if it is late, the Applicants offered no reasons why their submissions were filed after the 90-day deadline. However, I note that the Applicants live in what appears to be a rural region of India, and this may account for their not having received the General Division's decision until more than two months after it was mailed.

Prejudice to the Other Party

[33] 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.

Arguable Case

[34] The essence of the Applicants' submissions is that the General Division erred in finding that it lacked jurisdiction to hear their appeals on their merits. Having reviewed the relevant legislation and applicable jurisprudence, I see at least a reasonable chance of success on this ground of appeal.

[35] The General Division's analysis begins by noting the statutory authorities (subsections 66(1) and (2) of the CPP and subsection 51(9) of the CPP Regulations) relied upon by the Respondent to terminate the Applicants' DCCB and seek recovery of benefits already paid. It then declares that "[t]he seminal case dealing with jurisdiction in cases such as this is the decision of the Federal Court of Appeal in *Pincombe*," which addresses the Minister's discretionary powers under what is now subsection 66(4) of the CPP to take remedial action where a benefit has been denied as a result of erroneous advice or an administrative error. The General Division ultimately found that the Tribunal could not entertain an appeal on a discretionary decision of the Minister that was properly subject to review by application to the Federal Court.

[36] To my mind, the General Division's reasoning raises two questions. First, I am not sure whether the Minister's decision to deny the Applicants the DCCB and seek recovery can be categorized as discretionary. It is true that subsection 59(1) of the CPP Regulations allows the Minister discretion in how it assesses the evidence surrounding eligibility, but the substance of that eligibility is set out in subsection 44(1) of the CPP, which says that the DCCB *shall* be paid to each child of a disabled contributor. If that is the case, a right of appeal to the Tribunal would be established under sections 81 and 82 of the CPP, which offer recourse to beneficiaries who are "dissatisfied with any determination as to the amount of a benefit payable [...]."

[37] Second, having cited subsection 66(4) and *Pincombe*, nowhere in its decision does the General Division specify what "erroneous advice or administrative error" the Respondent may have made. If the General Division is referring to the Respondent's original decision to approve the Applicants for the DCCB, I am not sure if this can be characterized as "advice," "administrative" or "error." Rather, it would seem to be a substantive act—one that, on the face of it, has no applicability to the remedy enshrined in subsection 66(4).

[38] For this reason, I believe there is an arguable case that *Pincombe* and its descendants do not apply in the present situation. A plain reading of subsection 66(4) suggests that it was intended to help claimants who have been denied benefits, through clerical or staff errors, to which they otherwise would have been entitled; it is not, on its face, meant to be a mechanism by which the Minister makes or corrects substantive determinations regarding entitlement. It is notable that the Applicants have never claimed they were denied benefits because of an administrative error or erroneous advice, nor has the Minister admitted to such a mistake; rather, the Applicants were denied benefits because of a deliberate decision that was made in the wake of a comprehensive investigation. If there was an error here, it might have been in granting the DCCB to the Applicants in the first place, but even so, the Minister would likely argue that it came about only because of a fraudulent misrepresentation.

[39] I also think the Applicants have a potential argument that the General Division ignored a principle of natural justice. I note that the Respondent, in its written submissions to the General Division, never argued that this matter was beyond the purview of the Tribunal; indeed, it mounted an argument against the Applicants' DCCB entitlement on its merits and clearly assumed that the General Division would consider the evidence on that basis. For its part, the General Division then proceeded to conduct a hearing by way of written questions and answers that suggested an assessment of the evidence regarding the Applicants' paternity was underway. At no time was either of the parties asked for submissions on the issue of jurisdiction, and only when the decision was issued did it become clear that this had been a live issue for the General Division. A case can be made that the General Division's refusal to consider the merits of the appeal emerged from something akin to a summary process, in which the Applicants were, in effect, denied their right to be heard.

CONCLUSION

[40] As all four *Gattellaro* factors favour the Applicants, I have determined that this is an appropriate case to allow an extension of time to appeal beyond the 90-day limitation pursuant to subsection 57(2) of the DESDA. I was able to infer that the Applicants had a reasonable explanation for the delay and found that they had continuing intentions to pursue their appeals. I also thought it unlikely that the Respondent's interests would be prejudiced by extending time. Above all else, I found that they had an arguable case that the General Division erred in law when it determined that it lacked jurisdiction to hear their appeals on their merits.

[41] For that last reason, I am also granting leave to appeal. I invite parties to make submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

[42] This decision granting leave in no way presumes the result of the appeal on the merits of the case.

Member, Appeal Division