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

Citation: *T. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 248

Tribunal File Number: AD-16-1203
AD-16-1204

BETWEEN:

T. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: May 29, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal separate decisions of the General Division of the Social Security Tribunal of Canada (Tribunal), in which it refused to hear her appeals for the Canada Pension Plan (CPP) death benefit and survivor's pension on the grounds that they had been brought more than one year late.

FACTUAL BACKGROUND

[2] On December 27, 2013, the Applicant submitted separate applications for the CPP death benefit and survivor's pension.

[3] The Respondent refused both applications—initially and then on reconsideration in a letter dated April 4, 2014 (the Reconsideration Letter). In both cases, the Respondent found that the deceased contributor, the Applicant's late spouse, had not made the requisite 10 years of CPP contributions to qualify his widow for the death benefit and survivor's pension.

[4] On June 26, 2014, the Applicant sent a letter and Notice of Appeal to the Service Canada office in Scarborough, Ontario. On November 23, 2015, Service Canada returned these items to the Applicant, advising her that she was required to send the appeal to the Tribunal.

[5] The Applicant then sent the Notice of Appeal to the Tribunal, and it was received on April 22, 2016. On April 25, 2016, the Tribunal advised the Applicant that her appeal was incomplete, as it did not include a copy of the Reconsideration Letter.

[6] On June 30, 2016, the Applicant filed a copy of the Reconsideration Letter, at which time the Tribunal declared her appeal complete. Although the Applicant submitted a single appeal, the Tribunal divided it between two General Division members.

[7] In a decision dated September 7, 2016, Barry Barnes, addressing the applications for both the survivor's pension and the death benefit, found that the Applicant had filed her appeal on June 30, 2016, outside of the 90-day limit specified in paragraph 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA). Member Barnes then applied the four factors set out in *Canada v. Gattellaro,*[1] but he refused to allow an extension of time to appeal, finding that the Applicant's lack of an arguable case outweighed all other factors.

[8] In a decision dated September 12, 2016, John Rose, addressing the application for the death benefit only, also found that the Applicant had filed her appeal on June 30, 2016, outside of both the 90-day limit and the one-year limit specified in subsection 52(2) of the DESDA, beyond which no appeal could be brought. Accordingly, he too concluded that no extension of time was permissible.

[9] On October 16, 2016, within requisite time limitations, the Applicant submitted to the Appeal Division an application requesting leave to appeal detailing alleged grounds for appeal.

JOINING OF APPLICATIONS

[10] As this request for leave to appeal addresses two General Division decisions involving the same Applicant, the same set of facts and a common question of law, I think that it is appropriate to deal with them jointly, as permitted under section 13 of the *Social Security Tribunal Regulations* (SST Regulations). In taking this action, I am satisfied that no injustice will be caused to any party.

ISSUE

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

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

THE LAW

Social Security Tribunal Regulations

[12] According to subsection 24(1) of the SST Regulations, an appeal to the General Division must be in the form set out by the Tribunal on its website, and it must contain the following:

(a) a copy of the decision that was made under subsection 81(2) or (3) of the *Canada Pension Plan*, subsection 27.1(2) of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(b) the date the decision was communicated to the appellant;

(c) if a person is authorized to represent the appellant, the person's name, address, telephone number and, if any, facsimile number and email address;

(d) the grounds for the appeal;

(e) any documents or submissions that the appellant relies on in their appeal;

(f) an identifying number of the type specified by the Tribunal on its website for the purpose of the appeal;

(g) the appellant's full name, address, telephone number and, if any, facsimile number and email address; and

(h) a declaration that the information provided is true to the best of the appellant's knowledge.

Department of Employment and Social Development Act

[13] Pursuant to paragraph 52(1)(*b*) of the DESDA, an appeal must be brought to the General Division within 90 days after the day on which the decision was communicated to the appellant. Under subsection 52(2), the General Division may allow further time within which an appeal

may be brought, but in no case may an appeal be brought more than one year after the day on which the decision was communicated to the appellant.

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

[15] According to subsection 58(1), 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 made in a perverse or capricious manner or without regard for the material before it.

[16] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an 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 to appeal stage, an applicant does not have to prove the case.

[17] 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*[2] and *Fancy v. Canada (AG).*[3]

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

APPLICANT'S SUBMISSIONS

[18] In her application requesting leave to appeal, the Applicant made the following submissions:

(a) She is a first-generation immigrant and does not understand what the three permitted grounds of appeal mean, as they are heavily grounded in unfamiliar terminology. She would need the assistance of a lawyer to help her understand what is required to make this appeal. She asks the Tribunal to provide her support in helping her understand, in layperson's terms, what she needs to do to pursue her appeal to the General Division.

(b) She is confused as to why there are two different Tribunal file numbers for her case. There was no explanation as to why two people reviewed her case with two different discussions on the same topic. The Tribunal makes it very difficult to follow its processes, and she would appreciate greater transparency in the way it intends to pursue her cases.

(c) One of the General Division's decisions was "sliced" into many different pieces, making it difficult to read.

[19] In a letter dated May 2, 2017, the Tribunal reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) of the DESDA and asked her to provide, within a reasonable time frame, more detailed reasons for her request for leave to appeal. On May 23, 2017, the Applicant replied as follows:

(a) She feels as though there is an arguable case to appeal the original refusal, as her late husband was only a few months short of the 10-year requirement for the CPP survivor's pension. His untimely anoxic brain injury did not allow him to complete the few months that would have made him eligible for the pension.

(b) She would like to raise a doubt about the assessment of her husband's contribution period. Under subsection 44(3) of the CPP, the required number of years to meet the minimum contributions is one-third of 28 years or 9.33 years, which is rounded

up to 10 years (as established in *Tan v. MSD* and *MHRD v. Brown*[4]). There is nothing in the CPP that requires the Tribunal to round, either up or down, a fraction of the year in the calculation of the contributory period. She believes that the assessment of her husband's contribution period has been incorrectly and unfairly assessed, given that her husband fell just short (i.e. by only a few months) of the 10-year mark. In this respect, it would be only reasonable to round this figure up to 10 years.

(c) The General Division erred in not referring to the reason her appeal was late, specifically Service Canada's delay, which it acknowledged in returning her Notice of Appeal dated June 26, 2014. In other words, it took Service Canada one year and five months to notify her that her Notice of Appeal should have been mailed to the Tribunal instead. This was a delay over which that she had no control.

ANALYSIS

[20] I have reviewed the files that were before the General Division in their entirety and see no reasonable chance of success on the grounds that the Applicant submitted.

[21] The Applicant made separate applications for different types of CPP benefits, and I assume that it is for this reason that her appeal to the General Division was heard by two different members, even though they shared essentially the same facts and issues. In the end, Members Barnes and Rose both determined that, because the Applicant's appeals were late, they could not be heard—even though both members arrived at the same conclusion by different methods. In my view, only one of these methods was correct.

[22] In his decision of September 7, 2016, Member Barnes found that the appeal had been filed after the 90-day limit established by paragraph 52(1)(*b*) of the DESDA but before the one-year absolute deadline set out in subsection 52(2). Member Barnes noted that the Respondent's reconsideration decision was dated April 4, 2014 and found that the Applicant had succeeded in filing an appeal on June 26, 2014, when she had submitted, in person, a letter and Notice of Appeal at a Service Canada counter. As Member Barnes observed, "The Appellant was led to

[4] *Tan* v. *Minister of Social Development* (December 8, 2006), CP 20525 (PAB); *Minister of Human Resources and Development v. Brown* (August 20, 2003), CP 20353 (PAB).

believe that Service Canada would send these documents to the Tribunal on her behalf, otherwise why would they accept them?"

[23] As it happens, Service Canada did not forward the Applicant's documents to the Tribunal, and it did not even return them to the Applicant until nearly 1½ years later, by which time the strict deadline established by subsection 52(2) had long since elapsed. In my view, this neglect constituted a clear case of a ministerial error—one that effectively denied the Applicant an opportunity to file her appeal with the Tribunal in a timely manner.

[24] In his decision of September 12, 2016, Member Rose found that the complete Notice of Appeal had been submitted to the Tribunal more than one year after receipt of the Respondent's reconsideration letter, and I see no arguable case that the General Division relied on an erroneous finding of fact, misapplied the law or treated the Applicant unfairly.

[25] The law is unambiguous and permits no discretion. Section 24(1) of the SST Regulations sets out the components of an appeal to the General Division, one of which must be a copy of the letter from the Respondent denying the appellant's claim. Subsection 52(2) of the DESDA states that *in no case* [my italics] may an appeal be brought more than one year after the reconsideration decision was communicated to the appellant. In this case, the General Division found that the Applicant had not succeeded in perfecting her appeal until April 25, 2016, one year and eight months after the Respondent had issued its reconsideration letter. Unfortunately, the wording of this provision is so strict that it offers no leeway, not even to someone—such as the Applicant—whose appeal was one or more years late through no fault of her own.

[26] It is unfortunate that, due to a filing lapse, the Applicant is being denied an opportunity to appeal. However, the General Division was bound to follow the letter of the law, and so am I. Mere intention to pursue an appeal is irrelevant where more than one year has elapsed since the reconsideration. If the Applicant is asking me to exercise fairness and reverse the General Division's decision, I must emphasize that I cannot do so, as I lack the discretionary authority to do so and can exercise such jurisdiction only as granted by the Appeal Division's enabling

statute. Support for this position may be found in *Pincombe v. Canada*,[5] among other cases, which have 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.

[27] The Applicant insists that she is the victim of erroneous advice, and it appears that the Respondent did initiate an investigation into her allegations, pursuant to subsection 66(4) of the CPP. As the Applicant has noted, the Respondent did admit to an administrative error in its September 24, 2014 letter, but only in failing to protect the Applicant's entitlement to CPP disability benefits, such as it was, to March 2013, the date it received her incomplete application. The Applicant should be aware that neither the General Division nor the Appeal Division has the authority to review the Respondent's discretionary power to offer relief where it is satisfied a claimant has received erroneous advice.

[28] The Applicant also submitted that the General Division failed to recognize that Service Canada incorrectly calculated her late husband's contributory period for the purpose of determining whether she was eligible for the CPP death benefit and survivor's pension. Unfortunately, this argument is beyond the parameters of this decision, which must limit itself the question of whether the Applicant's appeals were late. However, as an aside, I note that the Respondent claims the contributory period of the Applicant's late husband was from June 1973 to October 2009, or more than 36 years (not 28 years, as she now claims); under subsection 44(3) of the CPP, the death benefit and survivor's pension shall be paid to the estate of a deceased contributor if he or she made valid contributions for 10 years or at least one-third of the total years within his or her contributory period, whichever is less. As a result, it would appear that the Applicant's late husband would have needed at least 10 years of valid contributions, which he apparently did not have. I have also briefly reviewed the two cases that the Applicant cited and, from what I can determine, neither one stands for the proposition that a contributory period that results in the maximum 10 years of required contributions can be "rounded down."

[5] *Pincombe v. Canada (Attorney General)* (1995), 189 N.R. 197 (F.C.A.).

CONCLUSION

[29] Subsection 58(1) of the DESDA sets out very limited grounds of appeal to the Appeal Division, which is permitted to determine only whether any of an applicant's reasons for appealing a General Division decision falls within the specified grounds and whether any of them has a reasonable chance of success.

[30] In my view, neither General Division member based his decision on an erroneous finding of fact made in a capricious or perverse manner or without regard for the record. Furthermore, neither member erred in law or breached a principle of natural justice. I have no choice but to agree with the General Division that this appeal is statute-barred for lateness.

[31] As I see no reasonable chance of success on the grounds of appeal put forward, the application for leave to appeal is refused.

Member, Appeal Division