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

Citation: *G. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 625

Tribunal File Number: AD-17-471

BETWEEN:

G. R.

Applicant

and

Minister of Employment and Social Development

Respondent

and

J. R.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: November 9, 2017

Canada

DECISION AND REASONS

DECISION

[1] Extension of time and leave to appeal are granted.

OVERVIEW

[2] The Applicant, G. R., and the Added Party, J. R., were formerly married. When they separated in 2004, they agreed that Ms. J. R. would have primary care of their two daughters, although Mr. G. R. would continue to have "generous access" to them. Mr. G. R. was later diagnosed with post-traumatic stress disorder and, in 2010, began receiving the *Canada Pension Plan* (CPP) disability pension. Shortly thereafter, Ms. J. R. applied, and was approved for, the CPP disabled contributor's child's benefit (DCCB).

[3] In 2013, Mr. G. R. informed the Respondent, the Minister of Employment and Social Development, that his elder daughter, K. R., had been living with him for the previous two years and was no longer in Ms. J. R.'s custody and control. The Respondent subsequently notified Ms. J. R. that she was no longer eligible to receive the DCCB for K. R., and it demanded repayment of more than $5,000 in benefits received during the period of August 2011 to June 2013. Ms. J. R. appealed this determination to the General Division of the Social Security Tribunal of Canada (Tribunal), arguing that, while her daughter had lived with her father during the relevant period, she was nonetheless the primary care giver.

[4] In a decision issued on September 7, 2016, the General Division allowed the appeal, finding that, despite K. R.'s residence in her father's home, the separation agreement remained in force, giving both parents joint decision making over educational, medical and religious matters. The General Division also placed weight on evidence that Ms. J. R., who lived only a short distance from her former partner, continued to play a large role in her daughter's upbringing.

[5] On June 26, 2017, after the statutory 90-day deadline, Mr. G. R. submitted an application requesting leave to appeal to the Tribunal's Appeal Division. He explained that his filing was late because he had not, until recently, appreciated that he was a party to the

proceedings. He alleged that the General Division erred in its interpretation of "custody and control" and made findings of fact that were at odds with the record. Ms. J. R. then responded, alleging that Mr. G. R. was well aware of his status as a party and claiming that, since she had discontinued a separate small claims court proceeding against him, her interests would be significantly prejudiced should the appeal be heard despite its lateness.

[6] Having considered the submissions and reviewed the General Division's decision against the evidentiary record, I have concluded that this is a suitable case in which to permit an extension of time. As the Applicant has also put forward an arguable case, I am granting leave to appeal.

ISSUES

[7] The issues before me are as follows:

(a) Should Mr. G. R. receive an extension of time in which to file his application for leave to appeal?

(b) Does Mr. G. R. have an arguable case that the General Division disregarded evidence that:

- K. R. resided with him from August 2011 to June 2013?
- he significantly contributed to her maintenance during that period?
- Ms. J. R. expressly acknowledged his entitlement to the DCCB in minutes of settlement dated March 12, 2014?

ANALYSIS

Issue 1: Should Mr. G. R. receive an extension of time to file his application for leave to appeal?

[8] Pursuant to the *Department of Employment and Social Development Act* (DESDA),[1] an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. The Appeal Division may allow

[1] Section 57 of the DESDA.

further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[9] The record indicates that the General Division issued its decision on September 7, 2016, and that the Tribunal received Mr. G. R.'s request for leave to appeal to the Appeal Division on June 26, 2017. This was more than nine months after the General Division's decision had been mailed, and well after the filing deadline set out in the DESDA.

[10] Having reviewed the submissions, I have come to the conclusion that an extension of time in this case is warranted. In *Canada v. Gattellaro*,[2] the Federal Court set out four factors to consider in deciding whether to allow further time to appeal:

(i) Whether there is a reasonable explanation for the delay;

(ii) Whether the applicant demonstrates a continuing intention to pursue the appeal;

(iii) Whether allowing the extension would cause prejudice to other parties; and

(iv) Whether the matter discloses an arguable case.

[11] The weight to be given to each of the *Gattellaro* factors may differ from case to case, and other factors may be relevant. However, the overriding consideration is that the interests of justice be served.[3]

(i) Reasonable explanation for the delay

[12] Mr. G. R. has offered an explanation for filing his request for leave to appeal several months after the deadline and, on balance, I find it plausible. He claims that he participated in the hearing before the General Division last year under the mistaken impression that he was a merely a witness, and not a party, to the proceedings. He pleads that he suffers from debilitating anxiety and was unaware that he had a right to appeal the General Division's decision until he was so advised by his lawyer in June 2017.

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

[13] Ms. J. R. expresses skepticism at this explanation, noting that Mr. G. R., as a former police officer, has an intimate knowledge of the legal system. Moreover, the General Division itself found that he was "aware" of his status as a party in an endorsement letter dated January 21, 2016.

[14] I acknowledge that Mr. G. R. is, on the face of it, relatively sophisticated, but I would not presume that a background in criminal law enforcement necessarily extends to understanding the sometimes arcane processes of administrative tribunals. While he may have consulted informally with counsel, the record shows that he largely represented himself in his dealings with the Respondent and, later, the General Division.

[15] It is clear Mr. G. R. was formally told that he had been added as a party to the proceedings.[4] Whether he appreciated what this meant in practical terms is another question. In correspondence to the General Division in advance of the hearing, Mr. G. R. wrote:

> [i]t is my understanding that […] [t]hat my ex-wife of 12 years Ms. J. R. has filed some sort of grievance with Canada Pension as a result of my children receiving a "survivors" monthly payment. That this will happen in a private room and I required to be in this room with Ms. J. R. (my ex-wife of 12 years). I understand that I am being challenged as to "validity of payments received by my daughter and that I may have somehow deceived CPP" in receiving monthly payments […]

[16] This was written many months before the General Division's decision against him and before he had any inkling that he would ultimately choose to bring an appeal, much less a late one. It suggests, at best, a rather hazy grasp of what was at stake at the hearing and lends credence to Mr. G. R.'s claim that he did not fully understand his position as a party. While the General Division did note that Mr. G. R. was "aware" that he had been added as a party to the proceeding,[5] the context of its communication suggests only that he had been *informed* of his changed status. To be informed of a fact does not necessarily mean that one is aware of all the implications associated with that fact.

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[4] In a letter to the Respondent dated November 25, 2015, and copied to Mr. G. R., the General Division wrote, "the Tribunal has decided that G. R. be added to the proceeding." In a letter to the parties dated November 26, 2015, the General Division wrote, "A person was added as a party. The Tribunal realized that the Disabled Contributor needed to be added as a party."

[5] Letter to the Respondent dated January 21, 2016 (GD10).

(ii) Continuing intention to pursue the appeal

[17] Although Mr. G. R. did not address this particular *Gattellero* factor, the thrust of his submissions is that he was, for several months, unaware of his right, as a party, to challenge the General Division's finding. Accordingly, while his intention to pursue the appeal may not have been "continuous," this was a function of his lack of knowledge about his rights as a party to the proceedings.

(iii) Prejudice to other parties

[18] Ms. J. R. argues that it would be an abuse of process to permit Mr. G. R. to procced with his appeal. In March 2016, she initiated a small claim against Mr. G. R., in parallel to her appeal to the General Division, seeking $5,159.90, in addition to punitive damages, in compensation for the DCCB that she alleges should have been hers, were it not for Mr. G. R. having informed the Respondent of his daughter's move to his residence. When the General Division ruled in her favour, Ms. J. R. waited 90 days before withdrawing her small claim, assuming that Mr. G. R. no longer had an avenue available to him to to reopen the matter. Ms. J. R. maintains that she would be prejudiced should an extension of time be granted, as she no longer has recourse in small claims court.

[19] I accept that Ms. J. R. has indeed withdrawn her small claim in the expectation that Mr. G. R.'s recourse to appeal at the Tribunal had been extinguished. However, whatever prejudice she may face is outweighed by Mr. G. R.'s right to pursue justice. I must note that the DESDA makes it clear that the 90-day appeal period is not absolute and that extensions of up to a year are possible at the Appeal Division's discretion, a point of law that Ms. J. R.—who at all times was represented by legal counsel—should have known. I also note that it is open to her to file another small claim against Mr. G. R., should she wish to do so.

[20] As for the Respondent, it is unlikely that extending Mr. G. R.'s time to appeal would prejudice its 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.

(iv) Arguable case

[21] An applicant seeking an extension of time must show that he has at least an arguable case on appeal at law. As it happens, this is also the test for leave to appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.[6]

Issue 2: Does Mr. G. R. have an arguable case that the General Division disregarded evidence?

[22] There are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal.[7] Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.[8]

[23] At this juncture, I will address only the arguments that, in my view, offer the Applicant his best chances of success on appeal.

(i) Custody and Control

[24] A trier of fact is presumed to have considered all the evidence before it. What is more, it is open to an administrative tribunal to sift through the relevant evidence, assess its quality, decide on its weight and determine what, if anything, it chooses to accept or disregard.[9] As trier of fact, the General Division was within its authority to weigh the evidence as it saw fit, so long as it did not commit a material error of fact and arrived at a defensible conclusion.

[25] That said, Mr. G. R. has put forward an arguable case that the General Division may have erred in law by finding that Ms. J. R. had rebutted the presumption in section 75 of the CPP that a disabled contributor has custody and control over their child where that child lives with them. Mr. G. R. also makes a case that the General Division may have based its decision on an

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[6] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[7] *Department of Employment and Social Development Act* (DESDA) at subsections 56(1) and 58(3).
[8] DESDA at subsection 58(1).
[9] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

erroneous finding of fact without regard for the record by discounting his involvement in K. R.'s daily life while systematically favouring Ms. J. R.'s comparable evidence.

(ii) Minutes of settlement

[26] Mr. G. R. alleges that the General Division erred in its interpretation of the minutes of settlement dated March 12, 2014, which stated:

> [10] The Respondent [Mr. G. R.] shall release the Applicant [Ms. J. R.] from any and all claims for reimbursement of the sum of $5,156.40 with respect to the payment to the Applicant of monies by CPP which the Respondent claims were properly payable to the Respondent for the twenty-four (24) months prior to K. R.'s 18th birthday.

[27] Mr. G. R. argues that Ms. J. R.'s execution of this agreement amounted to her express acknowledgement that he was entitled to the DCCB during the relevant period. He suggests that it was absurd to conclude otherwise, yet that it is what the General Division did.

[28] I also see an arguable case on this ground. While the General Division referred to the minutes of settlement in its review of the evidence, it did not address it in its analysis except to say that it had no jurisdiction over a civil matter. The wording of paragraph 10 of the minutes of settlement is not precisely clear, but it does seem to be an admission by the Ms. J. R. that the DCCB was "properly payable" to Mr. G. R. While it is not the Tribunal's role to enforce the terms of a private contract, Ms. J. R.'s acceptance of this provision may be relevant to the nature of her relationship with her daughter in the period from August 2011 to June 2013. In explicitly disregarding paragraph 10 of the minutes, the General Division may have refused to exercise its jurisdiction and thereby rendered its decision without considering an item of material evidence.

CONCLUSION

[29] Having weighed the four *Gattellaro* factors, I have determined that this is an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. Although Mr. G. R. did not have a continuing intention to pursue his appeal, he claims that the delay in filing his request for leave arose because he had not appreciated his standing in the proceedings—an

explanation that, on balance, I found reasonable. I also thought it unlikely that the other parties' interests would be significantly prejudiced by extending time. While it is unfortunate that Ms. J. R. prematurely terminated her small claim, she should have known that an appeal in this forum was still possible. Above all, I found at least two arguable grounds on which Mr. G. R.'s appeal could procced, and I am compelled, in the interests of justice, to extend time and, furthermore, to grant leave to appeal.

[30] Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[31] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division