



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. D. v. Minister of Employment and Social Development*, 2018 SST 947

Tribunal File Number: AD-18-580

BETWEEN:

S. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: September 27, 2018

DECISION AND REASONS

DECISION

[1] An extension of time and leave to appeal are refused.

OVERVIEW

[2] S. D., the Applicant, and D. F., a contributor to the Canada Pension Plan, lived together for 11 years. D. F. passed away in January 2013. In November 2015, the Applicant applied for a Canada Pension Plan survivor's pension, claiming that she was the common-law partner of the deceased contributor. The Respondent, the Minister of Employment and Social Development (Minister), approved the application effective December 2014, the maximum period of retroactivity permitted under the law.

[3] The Applicant appealed the Minister's decision to the General Division of the Social Security Tribunal, asking for a further 18 months of retroactive survivor's pension payments. In October 2017, the General Division conducted a hearing on the record and dismissed the Applicant's appeal because the law did not permit payment of more than 11 months of retroactive benefits. The General Division also found no evidence that the Applicant was incapable of forming or expressing an intention to make an application prior to November 2015.

[4] On September 11, 2018, the Applicant submitted an application for leave to appeal to the Tribunal's Appeal Division. In it, she claimed to have submitted her application for the survivor's pension earlier than November 2015 and suggested that it must have been "delayed by someone." She expressed her belief that she had been treated unfairly because she lacked social skills.

[5] I have reviewed the record and concluded that, since the Applicant's grounds of appeal would have no reasonable chance of success, this is not a suitable case in which to permit an extension of time.

ISSUES

[6] I must decide the following related issues:

Issue 1: Should the Applicant receive an extension of time in which to file her application for leave to appeal?

Issue 2: Does the Applicant have an arguable case that the General Division ignored evidence that she submitted her application for the survivor's pension earlier than November 2015?

ANALYSIS

Issue 1: Should the Applicant receive an extension of time in which to file her application for leave to appeal?

[7] 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 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.

[8] The record indicates that the General Division issued its decision on October 12, 2017, and that it was mailed to both the Applicant and her then-solicitor on the same day. There are memos on file dated April 5, 2018, and April 6, 2016, documenting telephone calls in which the Applicant asked Tribunal staff for status updates. Both memos indicate that the Applicant was under the impression that her solicitor had filed an appeal with the Appeal Division. The Applicant made a similar telephone inquiry on September 7, 2018, and the Tribunal received her application for leave to appeal to the Appeal Division four days later.

[9] I see no evidence that the Applicant submitted her application for leave to appeal any earlier than September 11, 2018—well after the DESDA's 90-day filing deadline.

¹ DESDA, s. 57(1)(b).

[10] Having reviewed the Applicant's submissions, I have come to the conclusion that an extension of time is not warranted in this case. In *Canada v. Gattellaro*,² the Federal Court set out four factors to consider when 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] In her application for leave dated September 11, 2018, the Applicant explained that the declaration was late because she did not know about the General Division's decision until she called the Tribunal for a status update.

[13] I do not find this explanation reasonable. The evidence on file shows that the General Division's decision was sent not just to the Applicant at her residence, but to her solicitor as well. By April 2018, when the Applicant first inquired about her appeal, the deadline was already long past. The record shows that even after being informed of the missed deadline, the Applicant took another five months to file an application for leave to appeal.

(ii) Continuing intention to pursue the appeal

[14] A claimant's ongoing interest in appealing is not the same thing as a continuing intention to pursue an appeal: an interest, unlike an intention, can exist whether or not the claimant's mind is on the matter.

[15] In this case, I am not convinced that the Applicant had a continuing intention to pursue an appeal. Again, I am influenced by the Applicant's documented behaviour in the period following

² *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

³ *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

the issuance of the General Division's decision in October 2017. The telephone memos from April 2018 suggest that the Applicant was already aware that the General Division had dismissed her appeal but, although Tribunal staff told her that she had missed the 90-day deadline, she did not file anything with the Appeal Division until September 2018. I see nothing to indicate that pursuing her appeal was a priority for the Applicant during this period.

(iii) Prejudice to the other party

[16] I find it unlikely that permitting the Applicant to proceed with her appeal at this late date would prejudice the Minister's interests, given the relatively short period of time that has elapsed since the expiry of the statutory deadline. I do not believe that the Minister's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

(iv) Arguable case

[17] An applicant seeking an extension of time must show that they have 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.⁴

[18] For the reasons that follow, I find that the Applicant has failed to put forward grounds that would have a reasonable chance of success on appeal.

Issue 2: Does the Applicant have an arguable case that the General Division ignored evidence that she submitted her application for the survivor's pension earlier than November 2015?

[19] 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.⁵ Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.⁶

⁴ *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

⁵ DESDA at ss. 56(1) and 58(3).

⁶ DESDA at s. 58(2).

[20] I do not see an arguable case that the General Division erred when it determined the first payment date of the Applicant's survivor's pension. The restriction on retroactive payment is mandated by the law, and the General Division correctly noted that s. 72(1) of the *Canada Pension Plan* (CPP) limits payment of the survivor's pension to no earlier than 11 months before the month in which the Minister received the application.

[21] The Applicant insists that she actually submitted her application earlier than November 2015, but she has offered no evidence to support this claim. Her credibility on this point is undermined by the fact that she never made this argument when the matter was before the General Division. Even if the Applicant had presented such an argument, there was nothing that the General Division could have done with it. With one exception, the CPP renders all extenuating circumstances irrelevant. The fact remains that the Applicant did not apply for the survivor's pension until November 2015; as a result, she was statute-barred from receiving payment any earlier than December 2014.

[22] The one exception to the 11-month rule is when a claimant is incapacitated from making an application, and in this case, it appears that the General Division gave full consideration to this possibility, even though it was not specifically pleaded by the Applicant.

[23] Subsections 60(8) to 60(10) of the CPP set out the requirements for a finding of incapacity. They allow an application to be deemed to have been made earlier than it was actually made, provided that a claimant can be shown to have been incapable of forming or expressing an intention to apply for the benefit. This standard of incapacity is high, requiring a claimant to show that he or she was not only physically unable to make an application but also unable to form or express an intention to do so. In this case, the General Division considered the available evidence and concluded that the Applicant was capable of forming or expressing an intention before November 2015, taking into account these factors:

- the Applicant applied for the Canada Pension Plan death benefit within three weeks of the deceased contributor's death; and
- the Applicant acted as executor of the deceased contributor's estate and was able to participate in related legal proceedings that concluded in January 2015;

I see no reason to question the General Division’s assessment, where it has cited the correct legal test for incapacity and has taken into account relevant evidence. While the Applicant may not agree with the outcome, I see nothing to suggest that these findings were erroneous, much less “made in a perverse or capricious manner or without regard for the material.”

CONCLUSION

[24] 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. I found that the Applicant did not have a reasonable explanation for the delay, nor did she demonstrate a continuing intention to pursue her appeal. Although I thought it unlikely that the Minister’s interests would be prejudiced by extending time, I could find no arguable case for any of the grounds advanced by the Applicant. This last factor was decisive; I see no point in advancing an application that is doomed to fail to a full appeal.

[25] Upon consideration of the *Gattellaro* factors and in the interests of justice, I am refusing this request to extend the time to appeal.



Member, Appeal Division

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| REPRESENTATIVE: | S. D., self-represented |
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