



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. G. v. Minister of Employment and Social Development*, 2018 SST 979

Tribunal File Number: AD-18-416

BETWEEN:

L. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision on Request for Extension of Time Kate Sellar
by:

Date of Decision: October 11, 2018

DECISION AND REASONS

DECISION

[1] An extension of time to apply for leave to appeal is refused.

OVERVIEW

[2] L. G. (the Claimant) and her husband, H. G., divorced on May 10, 1984. H. G. died on May 4, 2009. The Claimant had 36 months after the divorce to apply to equally divide the Canada Pension Plan credits they had accumulated when they lived together; this is called a Division of Unadjusted Pensionable Earnings (DUPE). The Claimant applied for a DUPE on October 30, 2015, but the Minister denied that application initially and on reconsideration.

[3] The Claimant appealed to this Tribunal. The General Division dismissed her appeal on April 5, 2018. The Claimant now appeals that decision to the Appeal Division.

[4] The Appeal Division must decide whether the Claimant's application is late. If it is late, the Appeal Division must decide whether an extension of time should be granted. The Appeal Division refuses the extension of time to apply for leave to appeal. Considering all of the relevant factors, the Appeal Division finds that it is not in the interests of justice to grant the extension of time.

ISSUES

[5] There are two issues to consider:

1. Is the application for leave to appeal late?
2. Considering the relevant criteria, should the Appeal Division grant the Claimant an extension of time?

ANALYSIS

Issue 1: Is the application for leave to appeal late?

[6] The application for leave to appeal is late.

[7] A claimant must submit an application for leave to appeal to the Appeal Division within 90 days of the Tribunal communicating the decision to the claimant—referred to here as the 90-day mark.¹ Section 40 of the *Social Security Tribunal Regulations* (Regulations) lists the information that an applicant must provide to the Tribunal to file a complete application. The Appeal Division may allow further time to request leave to appeal, but in no case can an application be made more than one year after the day on which the Tribunal communicates its decision—referred to here as the one-year limit.² The Appeal Division may grant an extension of time for an application that is submitted after the 90-day mark but before the one-year limit, as outlined in the *Department of Employment and Social Development Act* (DESDA).

[8] The General Division decision letter is dated April 5, 2018. The Claimant stated she does not know when she received this letter.³ According to s. 19(1) of the Regulations, a decision is deemed to have been communicated to a party 10 days after the day on which it is sent by ordinary mail, which in this case is April 15, 2018.

[9] The Claimant filed an incomplete application for leave to appeal with the Tribunal's Appeal Division. The Tribunal received this on June 27, 2018.⁴ In a letter dated July 4, 2018, the Tribunal wrote to the Claimant stating that her appeal was incomplete and requesting additional information. The Tribunal indicated that if it received the missing information by August 6, 2018, that information would be deemed received on June 27, 2018.

[10] The Claimant filed the completed application for leave to appeal on September 6, 2018. Because this was after the end of the 90-day mark of July 14, 2018, the application is late.⁵

¹ *Department of Employment and Social Development Act* (DESDA), s. 57(1)(b).

² DESDA, s. 57(2).

³ AD1A-2.

⁴ AD1.

⁵ AD1A.

However, it is within the one-year limit, so the Appeal Division can consider granting an extension of time.

Issue 2: Considering the relevant criteria, should the Appeal Division grant the Claimant an extension of time?

[11] An extension of time is refused.

[12] There are four criteria the Appeal Division must consider in order to determine whether to grant an extension of time. These are (i) whether there was a continuing intention to pursue the application; (ii) whether there is a reasonable explanation for the delay; (iii) whether the matter discloses an arguable case; and (iv) whether there is prejudice to the other party in allowing the extension.⁶

[13] The weight to be given to each of these four criteria 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.⁷

(i) Was there a continuing intention to pursue the application?

[14] The Claimant has demonstrated a continuing intention to pursue the application by the 90-day mark and continuously thereafter.

[15] A claimant should show an intention to bring an application by the 90-day mark and continuously thereafter.⁸ A claimant should pursue the appeal as diligently as can reasonably be expected.⁹

[16] Based on the date the Tribunal is deemed to have received the application, it is clear that the Claimant filed her initial incomplete application before the 90-day mark. She showed a

⁶ *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

⁷ *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

⁸ *Doray v. Canada*, 2014 FCA 87.

⁹ *Caisse Populaire Desjardins Maniwaki v. Canada (Attorney General)*, 2003 FC 1165.

continuing intention to pursue the application by providing additional information in response to the Tribunal's request. This then completed the application.

[17] The Claimant is unrepresented and appears to have done her best to communicate with the Tribunal in a timely manner. This shows a continuing intention to pursue her application for leave to appeal before the 90-day mark and continuously thereafter.

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

[18] The Claimant has provided a reasonable explanation for the delay.

[19] In response to the Tribunal's request for an explanation for her delay, the Claimant stated that she did not know that the application was late; that she lives in the United States, so it can take extra time for mail to arrive to her; and that she was out of the country for a period of time.

[20] This explanation lacks some detail, especially about when the Claimant was outside of the country, but on the whole, the explanation is reasonable.

(iii) Does the matter disclose an arguable case?

[21] The Claimant does not have an arguable case.

[22] The Claimant argues that the General Division made an error of fact because it reached its decision without regard for her evidence that her ex-husband was dangerous and violent with her, so she could not approach him after the divorce to secure an agreement for a DUPE. The Claimant argues that to approach her ex-husband to make such an agreement would have put her life in danger and that, in any event, he was not of sound enough mind to reach such an agreement with her.

[23] An arguable case in the context of a request for an extension of time requires that there be some reasonable chance of success.¹⁰ This is a very low threshold.

[24] According to the *Canada Pension Plan* (CPP), if a divorce occurred after January 1, 1978, but before January 1, 1987, an application for a DUPE may be made in writing to the

¹⁰ *Canada (Human Resources Development) v. Hogevoorst*, 2006 FC 401.

Minister within 36 months, or, if both former spouses agree in writing, at any time after the divorce.¹¹ If a divorce occurred on January 1, 1987, or after this date, a DUPE occurs, with few exceptions, once the Minister is informed of the divorce and receives certain information.¹² There is no time limit by which the Minister needs to receive that information to trigger a DUPE. The trigger is no longer an “application;” it is essentially automatic once the Minister has the required information.

[25] The CPP allows people who divorced when the Claimant did and who have missed the deadline to apply (for whatever reason) to still split the pension credits, provided they can reach an agreement with their ex-spouses. The Claimant argues that the General Division ignored her evidence that she was not able to benefit from that opportunity to reach an agreement because contacting her ex-spouse would have put her at a real risk of violence.¹³

[26] The General Division decision addressed two questions. These are (i) whether the Claimant could be awarded the DUPE based on the argument that her ex-husband did not have the mental capacity to waive the statutory time limit for the DUPE and (ii) whether the Claimant was unable to apply earlier for the DUPE due to her own incapacity.¹⁴ The General Division did not consider, nor does it have the jurisdiction to consider, whether the Claimant should be awarded a DUPE because extenuating circumstances meant she could not reach an agreement to split the pension credits after the time limit to apply for the split had passed.

[27] The General Division decision did not ignore the Claimant’s evidence about domestic violence and the role it played in her decision-making about the DUPE. The General Division acknowledged in its summary of the Claimant’s submissions that she was arguing that her ex-husband was unapproachable due to his history of violence with her.¹⁵ The General Division noted her evidence that she was fearful of further violence against her if she were to apply for the DUPE.¹⁶

¹¹ *Canada Pension Plan*, s. 55.

¹² *Canada Pension Plan*, s. 55.1.

¹³ GD1-8.

¹⁴ General Division decision, para. 9.

¹⁵ General Division decision, para. 5.

¹⁶ General Division decision, para. 8.

[28] However, the General Division found that this evidence about domestic violence was not relevant to the question of the ex-husband's capacity. The General Division found that the question of capacity is relevant only to making an application, not to waiving the time limit.¹⁷ The General Division found that even if it was incorrect about that and the question of incapacity is relevant to waiving the time limit, the fact that the Claimant's ex-husband was abusive did not mean that he was incapable of reaching an agreement with the Claimant on the DUPE.¹⁸

[29] Furthermore, the General Division concluded that the incapacity provision may not have applied to the Claimant based on when that rule came into effect. The General Division concluded that, if that rule did apply, the domestic violence the Claimant experienced did not mean that she was incapable of applying, within the meaning of the CPP; it only hindered her application.¹⁹ The General Division noted that the ex-husband's approval was not required to apply for the DUPE within the time limit and that the Claimant's lack of knowledge of the deadline could not be accepted as a justification for not applying in time. Essentially, the General Division did not ignore the evidence about domestic violence; it just concluded that the domestic violence did not make either the Claimant or her ex-husband incapable of applying, within the meaning of the law.

[30] The General Division did not consider specifically whether the domestic violence stopped the Claimant from reaching an agreement with her ex-husband to split the credits after the time limit. However, the General Division does not have the jurisdiction to impose a DUPE because the Claimant had legitimate reasons for failing to reach an agreement with her ex-husband on splitting the credits.

[31] The General Division did not ignore the Claimant's evidence, but it reached a conclusion that the Claimant does not agree with. This does not constitute an arguable case for an error of fact by the General Division.

¹⁷ General Division decision, para. 13.

¹⁸ General Division decision, para. 14.

¹⁹ General Division decision, para. 15.

(iv) Is there prejudice to the Minister in allowing the extension?

[32] There is no prejudice to the Minister in allowing the Claimant an extension of time. The Appeal Division anticipates that at the next stage of the proceedings, the Minister would not be prejudiced in providing a submission on the appeal based on the existing record.

Application for Extension of Time Refused

[33] Having considered all of the criteria, the Appeal Division refuses the application for an extension of time.

[34] The Claimant showed her intention to appeal before the 90-day mark and continuously thereafter. She has a reasonable explanation for the delay that is in line with the length of the delay itself, which is not significantly lengthy. There is no prejudice to the Minister in allowing her application to proceed. However, the Claimant does not have an arguable case for an error by the General Division. The overall consideration is that the interests of justice be served. It is not in the interests of justice to grant an extension of time for a matter in which the Claimant does not have a reasonable chance of success. In this case, the arguable case factor weighs heavily.

[35] The Claimant is unrepresented, and it is her obligation to show that there is some reasonable chance of success as part of the test for the extension of time on leave to appeal. However, because refusing the extension of time for leave to appeal means there will be no actual application for leave to appeal for the Appeal Division to decide, the Appeal Division also reviewed the record and is satisfied that the General Division did not ignore or misconstrue any of the evidence.²⁰ The Claimant's case raises important public policy questions about the impact of the rules for the DUPE as they apply to survivors of domestic violence. However, as the General Division pointed out, the Tribunal is created by legislation and has only the powers granted to it by its governing statute.

²⁰ For more on the General Division's obligation not to take an overly "mechanistic" view of the grounds of appeal, see *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

CONCLUSION

[36] Therefore, the request for an extension of time for leave to appeal is refused.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	L. G., self-represented
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