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

Citation: *L. H. v Minister of Employment and Social Development*, 2019 SST 1282

Tribunal File Number: AD-19-637

BETWEEN:

L. H.

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: October 4, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, L. H., is the widow of the late B. H., who passed away in August 2013 at the age of 47. B. H. was a X who spent much of his career in South Africa before moving on to projects in Canada and Australia.

[3] In January 2014, the Applicant applied for a Canada Pension Plan (CPP) survivor's pension. The Respondent, the Minister of Employment and Social Development (Minister) refused the application because B. H. had not contributed to the CPP for at least 10 years, as required by the law. The Minister found that B. H. had only four years of contributions to the CPP and, by application of a reciprocal treaty with Australia, only four years of creditable contributions to that country's social security system.

[4] On March 2019, after the 90-day deadline specified by the *Department of Employment and Social Development Act (DESDA)*, the Applicant appealed the Minister's refusal to the Social Security Tribunal's General Division. In a decision dated June 19, 2019, the General Division refused to grant the Applicant an extension of time to appeal because it found that she did not have an arguable case.

[5] The Applicant has now requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division breached a principle of natural justice when it agreed with the Minister that her late husband had only eight years of combined creditable contributions to the CPP and to the Australian social security system. The Applicant claims that, in fact, the late B. H. registered 11 years of combined contributions.

[6] Having reviewed the General Division's decision against the underlying record, I have concluded that the Applicant has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[7] According to section 58(1) of the DESDA, there are only three grounds of appeal to the Appeal Division: the General Division failed to observe a principle of natural justice; erred in law; or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[8] An appeal may be brought only if the Appeal Division first grants leave to appeal.[1] To grant leave to appeal, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success corresponds to an arguable case at law.[3]

[9] I must determine whether the Applicant has an arguable case on the following issues:

Issue 1: Did the General Division apply the correct test when it refused the Applicant an extension of time to appeal?

Issue 2: Did the General Division err when it found that the Applicant's late husband had not made sufficient CPP contributions to qualify her for the survivor's pension?

ANALYSIS

Issue 1: Did the General Division apply the correct test when it refused the Applicant an extension of time to appeal?

[10] Under section 52(1)(b) of the DESDA, an appeal must be submitted to the General Division within 90 days after the day on which the decision was communicated to the claimant. Under section 52(2), the General Division may allow the claimant further time to bring an appeal. In doing so, the General Division must consider four factors set out in *Canada v Gattellaro*.[4]

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[1] DESDA at ss 56(1) and 58(3).
[2] Ibid. at s 58(2).
[3] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[4] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

[11] I do not see an arguable case that, in deciding whether to allow an extension of time, the General Division committed any factual or legal errors.

[12] The General Division was not wrong to find that the Applicant's appeal had been submitted after the 90-day deadline. The Applicant stated that she had received the reconsideration decision on December 13, 2018,[5] and the General Division received her notice of appeal on March 28, 2019—105 days later.

[13] Once an appeal is late, it may be disposed of by way of a process similar to summary dismissal, which, like the test for leave to appeal, requires claimants to show that they have an arguable case. This threshold high.[6] It must be plain and obvious on the record that the appeal is bound to fail.

[14] The *Gattellaro* factors have to be weighed, but they do not have to be given equal weight. As the General Division correctly noted, the overriding consideration is that the interests of justice be served.[7] In this case, the General Division found that, although the Applicant succeeded on three of the four factors, her lack of an arguable case outweighed all other considerations. The General Division examined the Applicant's argument and, for reasons that I will explore below, came to the defensible conclusion that there was no way, under the applicable law, to derive 10 years of valid contributions from B. H.' Canadian and Australian earnings history.

Issue 2: Did the General Division err when it found that the Applicant's late husband had not made sufficient CPP contributions to qualify her for the survivor's pension?

[15] The *Canada Pension Plan* requires at least 10 years of valid contributions to qualify an applicant for the survivor's pension.[8] Under a reciprocal treaty between Canada and Australia (Treaty), time spent living and working in one country may assist a claimant to qualify for benefits in the other.[9]

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[5] Applicant's Notice of Appeal to the General Division dated March 28, 2019, GD1-2.
[6] *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; *Breslaw v Canada (Attorney General)*, 2004 FCA 264.
[7] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[8] *Canada Pension Plan*, section 44(1)(d) and sections 44(3)(a) and (b).
[9] *Agreement on Social Security Between the Government of Canada and the Government of Australia*, E104619 - CTS 2003 No. 4.

[16] The Applicant notes that, while Canada recognizes CPP contributions made during the calendar year, Australia operates according to a fiscal year that runs from July 1 to June 30. She argues that, if B. H.'s Australian contributions are distributed across Australian fiscal years, then her late husband actually registered 11 qualifying years in total. The Applicant alleges that the General Division's failure to recognize contributions under one system but not the other is an error of law and a breach of natural justice.

[17] I do not see an arguable case for this submission.

[18] In her application for leave to appeal, the Applicant included a table that showed how she derived 11 years of contributions from her late husband's Canadian and Australian work history:[10]

Year 1	Canada	2006 - January 1, 2006 – December 31, 2006	Paid FULL contributions
Year 2	Canada	2007 - January 1, 2007 – December 31, 2007	Paid FULL contributions
Year 3	Canada	2008 - January 1, 2008 – December 31, 2008	Paid FULL contributions
Year 4	Canada	2009 - January 1, 2009 – December 31, 2006	Paid FULL contributions
Year 5	Australia	July 1, 2007 – June 30, 2008	Paid FULL contributions
Year 6	Australia	July 1, 2008 – June 30, 2009	Paid FULL contributions
Year 7	Australia	July 1, 2009 – June 30, 2010	Paid FULL contributions
Year 8	Australia	July 1, 2010 – June 30, 2011	Paid FULL contributions
Year 9	Australia	July 1, 2011 – June 30, 2012	Paid FULL contributions
Year 10	Australia	July 1, 2012 – June 30, 2013	Paid FULL contributions
Year 11	Australia	July 1, 2013 – June 30, 2014	Paid FULL contributions

This table, as far as I can tell from the record, is accurate, but it does not help the Applicant for two reasons.

[19] First, contrary to the Applicant's submissions, the Treaty specifies that calendar years are to be used in determining CPP creditable periods derived from Australian residence or contributions:

> For the purposes of determining eligibility for a benefit under the Canada Pension Plan, a calendar year which includes a period of Australian working life residence of at least 6 calendar months shall be considered as a year for which contributions have been made under the Canada Pension Plan.[11]

[10] There appears to be an error in the line labelled "Year 4." I will assume that it is intended to read "December 31, *2009*."
[11] Treaty, Article 9, Section 2(b).

The Applicant offered no evidence to the General Division that her late husband had, for any of her proposed additional creditable periods, in fact registered a "period of Australian working life residence" for at least six calendar months.

[20] Second, the table does not come to terms with the reason why the Minister had recognized only four years (2010, 2011, 2012, and 2013) of Australian contributions. There is a provision in the Treaty that states: "For the purposes of this Article, where a Canadian creditable period and a period of Australian working life residence coincide, the period of coincidence shall be taken into account once only as a Canadian creditable period."[12] Since, according to the Applicant own information, B. H. had creditable periods in both Canada and Australia for 2008 and 2009, the periods labelled "Years 5 and 6" in the above table must be eliminated, leaving only nine years, at most, of qualifying contributions for CPP purposes.

[21] It is clear that the Treaty was designed to prevent periods of overlapping residence in the two countries from counting as separate creditable periods. In its decision, the General Division did not mention the Treaty, but it implicitly endorsed the Minister's interpretation of it. I do not see an arguable case that the General Division erred in doing so. Ultimately, the evidence showed that B. H. lived and worked in Canada and Australia from 2006 to 2013, inclusively, for a total of no more than eight years.

CONCLUSION

[22] Since the Applicant has not identified any grounds of appeal that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	L. H., self-represented

[12] Treaty, Article 9, Section 3.