



Citation: *ER v Minister of Employment and Social Development*, 2022 SST 1396

## **Social Security Tribunal of Canada Appeal Division**

# **Extension of Time and Leave to Appeal Decision**

**Applicant:** E. R.  
**Representative:** M. M.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** General Division decision dated April 4, 2022  
(GP-14-3951)

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**Tribunal member:** Jude Samson

**Decision date:** November 15, 2022

**File number:** AD-22-497

## Decision

[1] E. R. is the Claimant in this case. She filed her application to the Appeal Division on time. However, her appeal has no reasonable chance of success. As a result, I cannot give her permission to appeal. Her appeal will not proceed.

## Overview

[2] The Claimant married the Contributor, W. B., in April 1999. At the time, the Claimant had two children from a previous relationship. The Claimant and Contributor met in the Claimant's home country and spent short periods together there. The Contributor tried bringing the Claimant and her children to Canada, but Canadian authorities would not allow it.

[3] Sadly, the Contributor died in January 2001.

[4] In April 2012, the Claimant applied for a *Canada Pension Plan* Survivor's Pension. The Minister of Employment and Social Development (Minister) refused her application. The Claimant appealed the Minister's decision to the Tribunal's General Division but it dismissed her appeal.

[5] The Claimant now wants to appeal the General Division decision to the Tribunal's Appeal Division. However, her appeal appears to be late. Plus, she needs permission to appeal for her file to move forward.

[6] I've decided that the Claimant's appeal was filed on time. However, it has no reasonable chance of success. As a result, I cannot give the Claimant permission to appeal.

## Issues

[7] I have to decide the following issues:

- a) Was the Claimant's application to the Appeal Division late?
- b) Does the Claimant's appeal have a reasonable chance of success?

## Analysis

### The Claimant's application was on time

[8] The Tribunal sent the General Division decision to the Claimant and her representative by email on April 4, 2022. I assume that they received it the next day.<sup>1</sup>

[9] As a result, the Claimant's application to the Appeal Division was due on July 4, 2022.

[10] The Claimant emailed the Tribunal on July 1, 2022, saying that she had prepared "responses" to the General Division decision.<sup>2</sup> In that email, the Claimant said that she had had delays because of her representative's health and the need to get "translations and legalizations." She also mentioned difficulties in her country and asked for more time to send documents to the Tribunal.

[11] The Claimant emailed the Tribunal again on July 10, 2022.<sup>3</sup> This time she included her lengthy "response" to the General Division decision, along with some new documents.

[12] In hindsight, the Claimant's emails were attempts to appeal the General Division decision. However, the Tribunal didn't recognize what the Claimant was trying to do, it delayed responding to her letters, and it never answered her request for more time to send documents to the Tribunal.

[13] I consider the Claimant's email of July 1, 2022, to be an application to the Appeal Division. This means that the Tribunal received the application on time. While the Claimant's application might have been incomplete at first, the special circumstances described above allow me to waive the strict application requirements.<sup>4</sup>

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<sup>1</sup> Section 19(1)(c) of the *Social Security Tribunal Regulations* (SST Regulations) allows me to make this assumption.

<sup>2</sup> A version of that email now appears on page AD1-29.

<sup>3</sup> The email of July 10, 2022, included all the documents on pages AD1-9 to AD1-28 and AD1-30 to AD1-34.

<sup>4</sup> Section 3(b) of the SST Regulations give me this power.

## **I am not giving the Claimant permission to appeal**

[14] Most Appeal Division files follow a two-step process. This appeal is at step one: permission to appeal.

[15] The legal test that the Claimant needs to meet at this step is low: Is there any arguable ground on which the appeal might succeed?<sup>5</sup> If the appeal has no reasonable chance of success, then I cannot give the Claimant permission to appeal.<sup>6</sup>

[16] To decide this question, I focused on whether the General Division could have made a relevant error.<sup>7</sup> I wrote to the Claimant asking for more information about possible errors in the General Division decision, and I have considered her response.<sup>8</sup>

### **– The General Division concluded that the Claimant doesn't qualify for a Survivor's Pension**

[17] The General Division had to decide whether the Claimant qualified for a Survivor's Pension. To do so, the Claimant needed to prove that she was married to the Contributor at the time of his death. And because she was under 35 years when he died, the Claimant also needed to prove that she was either disabled or maintaining the Contributor's children.

[18] The General Division found that the couple married in April 1999.

[19] However, the General Division found that the Claimant was not disabled and that she was not maintaining the Contributor's children.

[20] To be "disabled," the General Division noted that the Claimant needed to meet the very strict test described in the *Canada Pension Plan*. However, the General

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<sup>5</sup> This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at paragraph 16.

<sup>6</sup> This is the legal test described in section 58(2) of the *Department of Employment and Social Development Act*.

<sup>7</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act*.

<sup>8</sup> The Tribunal's letter is dated September 22, 2022. The Claimant's response is document AD1C in the appeal record.

Division decided that the Claimant had not provided enough objective medical evidence to prove that she was disabled.

[21] The General Division also asked whether the Claimant's children could be considered the Contributor's children too. The Contributor never legally adopted the Claimant's children. But had he adopted them "in fact"? After a detailed review of the evidence, the General Division decided that the Contributor did not have custody and control of the Claimant's children, meaning that he had not adopted them "in fact."

[22] As a result, the Claimant was not maintaining the Contributor's children and did not qualify for the Survivor's Pension.

– **The Claimant's appeal has no reasonable chance of success**

[23] I have reviewed all the Claimant's arguments.<sup>9</sup> Overall, she is asking me to do the following:

- consider new medical evidence confirming that she is disabled;<sup>10</sup>
- consider new evidence about the Contributor's visits to the Claimant's country;<sup>11</sup> and
- reweigh all the evidence and find that the Contributor had custody and control of her children.

[24] Unfortunately, the law does not allow the Appeal Division to consider new evidence or to reweigh the evidence.<sup>12</sup>

[25] While there are some exceptions to the Appeal Division's general rule against considering new evidence, none of the exceptions apply here.

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<sup>9</sup> The Claimant's arguments can be found in documents AD1 and AD1C of the appeal record.

<sup>10</sup> See pages AD1-17 to 20 and AD1-34 in the appeal record.

<sup>11</sup> See pages AD1-30 to AD1-33 in the appeal record.

<sup>12</sup> The Federal Court of Appeal made these points in *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraphs 35 to 39 and 43 to 47.

[26] Aside from the Claimant's arguments, I also reviewed the file and examined the General Division decision.<sup>13</sup> The General Division summarized the law and used evidence to support its decision. I didn't find evidence supporting the Claimant's appeal that the General Division might have ignored or misinterpreted.

[27] I sympathize with the Claimant's circumstances. Like the General Division, I would ask the Minister to consider as quickly as possible whether the Claimant qualifies for a Survivor's Pension based on her second application. The Claimant submitted her second application in 2021, after Parliament made some important changes to the law.

## **Conclusion**

[28] The Claimant's appeal has no reasonable chance of success. As a result, I cannot give her permission to appeal. The Tribunal will close her appeal file.

Jude Samson  
Member, Appeal Division

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<sup>13</sup> The Federal Court has said that I must do this in decisions like *Griffin v Canada (Attorney General)*, 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615.