



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. O. v. Minister of Employment and Social Development*, 2016 SSTADIS 419

Tribunal File Number: AD-16-738

BETWEEN:

A. O.

Applicant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: October 26, 2016

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division (GD) of the Social Security Tribunal (SST) refusing an extension of time to appeal.

BACKGROUND

[2] The Applicant is an Old Age Security (OAS) pensioner and recipient of the Guaranteed Income Supplement (GIS). In October 2011, the Respondent notified her that it had recalculated her GIS entitlement based on previously-undisclosed information that her husband was receiving a private pension. As a result, the Respondent determined that it had overpaid the Applicant in the amount of \$4,735 and initiated steps to seek recovery.

[3] In a letter dated September 17, 2012, the Respondent denied the Applicant's request for reconsideration. On March 12, 2014, the Applicant filed an incomplete appeal of the reconsideration decision with the GD. In response, the SST asked Applicant to provide the missing information, and she perfected her appeal on June 27, 2014.

[4] In a decision dated January 22, 2016, the GD determined that the Applicant had been late in filing her appeal and refused an extension of time. In doing so, the GD determined that the one-year time limit under subsection 52(2) of the *Department of Employment and Social Development Act* (DESDA) did not apply to appellants who were notified of a reconsideration decision before April 1, 2013. However, it then found that the Applicant's lack of an arguable case outweighed weighed all other considerations.

[5] The Applicant filed an application for leave to appeal with the Appeal Division (AD) of the SST on April 13, 2016, within the time limit set out in paragraph 57(1)(b) of the DESDA.

ISSUE

[6] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

Department of Employment and Social Development Act

[7] Under paragraph 52(1)(b) of the DESDA, which came into effect on April 1, 2013, an appellant has 90 days to bring his or her appeal to the GD. The GD can decide to allow further time for an appellant to appeal pursuant to subsection 52(2), but in no case may an appeal be brought to the GD more than one year after the day on which the Respondent's reconsideration decision was communicated to the appellant.

[8] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted. The AD must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[9] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

- (a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The GD based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[10] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

[11] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success – *Canada (MHRD) v. Hogervorst; Fancy v. Canada (AG)*.¹

Gattellaro

[12] In deciding whether to allow further time to appeal, an administrative tribunal must weigh the four factors set out in *Canada (MHRD) v. Gattellaro*²:

- (a) The Applicant must demonstrate a continuing intention to pursue the appeal;
- (b) There is a reasonable explanation for the delay;
- (c) The matter discloses an arguable case; and
- (d) There is no prejudice to the other party in allowing the extension.

[13] The weight to be given to each of the *Gattellaro* factors 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 – *Canada (AG) v. Larkman*.³

Old Age Security Act

[14] Section 11 of the Old Age Security Act (OASA) provides for payment of a monthly GIS to a person who has been approved for an OAS pension and who is residing in Canada. Section 13 states that the pensioner's income, as determined under the *Income Tax Act*, is to be used for the purpose of determining the amount of GIS.

[15] Subsection 28(2) of the OASA states:

If, on an appeal to the Social Security Tribunal, it is a ground of the appeal that the decision made by the Minister as to the income or income from a particular source or sources of an applicant or beneficiary or of the spouse or common-law partner of the applicant or beneficiary was incorrectly made, the appeal on that ground must, in accordance with the regulations, be referred for decision to the Tax Court of Canada,

¹ *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63

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

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

whose decision, subject only to variation by that Court in accordance with any decision on an appeal under the Tax Court of Canada Act relevant to the appeal to the Social Security Tribunal, is final and binding for all purposes of the appeal to the Social Security Tribunal except in accordance with the Federal Courts Act.

APPLICANT'S SUBMISSIONS

[16] In her application requesting leave to appeal, the Applicant stated that she had never sought money that she was not entitled to receive. She felt the entire process was unfair and questioned why the Respondent waited six months before informing her that her family income was too high.

ANALYSIS

[17] Having reviewed the decision of the GD against the law and the record, I see a reasonable chance of success on appeal.

[18] The GD found that the one-year time limit under subsection 52(2) of the DESDA does not apply to those applicants who were notified of a reconsideration decision before April 1, 2013. In coming to this conclusion, the GD considered the rules of statutory interpretation, in particular, the general rule that legislation is not to be interpreted as having retrospective application. I endorse this reasoning and do not think that, in this case, the Applicant should be barred from pursuing her appeal merely because it took more than 18 months to perfect it.

[19] However, I think there is an arguable case that the GD erred in law when it failed to properly apply *Gattellaro* in refusing an extension of time to appeal. While the GD cited the four *Gattellaro* factors in its decision, it offered no discussion on three of them, suggesting instead that the absence of an arguable case decided the matter.

[20] It appears the GD may have confused its own lack of jurisdiction over income assessment with an absence of an arguable case. The GD was correct in concluding that subsection 28(2) of the OASA prevents it from assessing the income of an applicant. However, a case can be made that this should not have been the determining factor in whether to extend the time for filing the appeal. In this case, declining to extend the time effectively deprived the Applicant any right of appeal to the Tax Court of Canada.

CONCLUSION

[21] Leave to appeal is granted. I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

[22] This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

A handwritten signature in blue ink, appearing to read "J. R. ...", is positioned above a horizontal line.

Member, Appeal Division