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

Citation: *A. O. v. Minister of Employment and Social Development*, 2016 SSTADIS 500

Tribunal File Number: AD-16-738

BETWEEN:

A. O.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: December 22, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal (SST) issued on January 22, 2016, which refused an extension of time to appeal the Respondent's decision to seek recovery of alleged Guaranteed Income Supplement (GIS) overpayments.

OVERVIEW

[3] The Applicant is an Old Age Security (OAS) pensioner and recipient of the 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.

[4] 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 the Applicant to provide the missing information, and she perfected her appeal on June 27, 2014.

[5] 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.

[6] 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. On October 26, 2016, I granted leave to appeal on the grounds that the GD may have erred in rendering its decision by confusing its own lack of jurisdiction over income assessment with an absence of an arguable case, for the purpose of determining whether the Appellant was entitled to an extension of time to appeal.

[7] The Appellant's submissions were set out in her application for leave to appeal. In a letter to the AD dated December 12, 2016, the Respondent asked that the GD's decision be quashed and the matter be returned for a hearing on the merits of the matter.

[8] I have decided that an oral hearing is unnecessary and this appeal can proceed on the basis of the documentary record for the following reasons:

(a) The Respondent has conceded that a new hearing before the GD is needed;

(b) There are no gaps in the file or need for clarification;

(c) This form of hearing respects the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

Department of Employment and Social Development Act

[9] 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.

[10] 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.

[11] 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.

[12] 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.

[13] 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

[14] 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

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[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.

(d) There is no prejudice to the other party in allowing the extension.

[15] 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

[16] 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.

[17] 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, 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.

ISSUE

[18] Did the GD err in law when it refused the Appellant an extension of time to appeal?

SUBMISSIONS

[19] In her application requesting leave to appeal and notice of 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.

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

[20] As noted above, the Respondent consented to the appeal being granted and returned to the GD of for hearing on the merits. As the reconsideration decision was issued on September 17, 2012 and the Appellant submitted a letter dated October 5, 2012, the Respondent conceded that the appeal was filed within due time. The Respondent therefore recommended that a hearing on the merits be held before the GD, where it will be submitted that the appeal should be dismissed because the Appellant's sole ground of appeal is her lack of ability to repay the overpayment.

ANALYSIS

[21] Having reviewed the record, I agree with the parties that the GD erred in law in rendering its decision. The Respondent concedes that the GD failed to properly apply *Gattellaro* in refusing an extension of time to appeal. I note that, 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.

[22] 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, but this should not have been the determining factor in whether to extend the time for filing the appeal. In this case, declining an extension effectively deprived the Appellant any right of appeal to the Tax Court of Canada.

CONCLUSION

[23] For the reasons discussed above, the appeal succeeds on the ground that the GD erred in law when it determined that the Appellant had no arguable case for the purpose of determining entitlement to an extension of time to appeal.

[24] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the GD for a *de novo* hearing before a different GD member.

Member, Appeal Division