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

Citation: *T. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 722

Tribunal File Number: AD-17-534

BETWEEN:

T. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: December 8, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] This appeal involves two layers of lateness. First, the Respondent, the Minister of Employment and Social Development (Minister), informed the Applicant by letter dated October 3, 2013, that the Guaranteed Income Supplement (GIS) he had been receiving was overpaid and had to be reimbursed (GD2-19). If the Applicant was unhappy with the decision, he had 90 days to submit a request for reconsideration.

[2] The Applicant says that he never received this letter and it may not have been until the summer of 2015 when he realized that there was an issue with the amounts that he had been receiving. He wrote to the Minister about the issue on August 17, 2015 (GD2-6). The Minister treated the Applicant's letter of August 2015 as a request to reconsider its decision from October 2013. The Minister responded in February 2016, saying it refused to reconsider its initial decision because the request to do so had been submitted too late (GD2-7).

[3] The Applicant next appealed the Minister's February 2016 decision to the General Division of the Social Security Tribunal of Canada (Tribunal). However, in a decision dated April 3, 2017, the General Division dismissed the Applicant's appeal (AD1-7). In turn, the Applicant had 90 days to file an application requesting leave to appeal with the Tribunal's Appeal Division, but that application was also received late. This is the second layer of lateness mentioned above.

[4] In order for this appeal to proceed, the Applicant now has two preliminary hurdles to overcome. First, since his application requesting leave to appeal was filed with the Tribunal's Appeal Division after the 90-day deadline, I must decide whether an extension of time should be allowed. And second, like most appeals before the Tribunal's Appeal Division, it can proceed only if leave to appeal (permission) is granted.

[5] I will begin this decision with a few background facts and then set out my reasons for concluding that the appeal was filed late. I will then explain my reasons for allowing the extension of time and granting leave to appeal, and provide some comments for moving forward.

BACKGROUND FACTS

[6] The GIS provides a monthly benefit to Old Age Security (OAS) pension recipients who have a low income and are living in Canada. The amount of the GIS that people receive is based on their marital status and on their previous year's income (or in the case of a couple, their combined income).

[7] In this case, the Minister approved the Applicant's GIS application for the period starting from April 2012. Payments were calculated based on the Applicant being separated from his spouse, as he had declared on his application (GD2-4). However, the Minister later concluded that the Applicant had reconciled with his former spouse and was living with her from the time when he started to receive his GIS payments until May 2012 and from October 2012 until February 2013 (GD2-19).

[8] During these periods, and for three months following each separation, the Minister recalculated the amount of the GIS to which the Applicant was entitled using the combined income of the Applicant and his spouse. As a result, the Applicant was advised in the letter dated October 3, 2013, that his GIS had been overpaid by $3,450.42, and that this amount would be recovered through monthly deductions from his OAS pension. If he disagreed with the decision, the Applicant was invited to request that it be reconsidered within 90 days of receiving the letter (GD2-20).

[9] However, there is no evidence that the Applicant communicated with the Minister until August 2015 (GD2-6). Although the Applicant made no mention of any earlier decision, the Minister treated the Applicant's letter of August 2015 as a request to reconsider the decision of October 2013, but refused to do so because the 90-day deadline had expired (GD2-7). Other than the timing issue, the Minister did not provide any other reason for refusing to reconsider its initial decision. However, if the Applicant still disagreed with the Minister's decision, he was invited to appeal to the Tribunal's General Division, which he did.

[10] The Tribunal's General Division dismissed the Applicant's appeal in April 2017, on the basis of the documents and submissions already filed (AD1-7). The General Division concluded that the reconsideration request was received by the Minister considerably more than 365 days

after the day on which the Applicant had received the initial decision. As a result, the General Division held that the *Old Age Security Regulations* (OAS Regulations) required the Applicant to show that three requirements had been met, including that the request for reconsideration had a reasonable chance of success.

[11] After considering the evidence, the General Division concluded that the Applicant's reconsideration request had no reasonable chance of success and dismissed the appeal.

[12] The Applicant then had a further 90 days to appeal the General Division's decision to the Appeal Division.

ANALYSIS

Was the application requesting leave to appeal to the Appeal Division late? Yes.

[13] The General Division's decision was dated April 3, 2017, but the Applicant declared that he had received it on April 20, 2017 (AD1-3 and 5). As a result, his application requesting leave to appeal was due 90 days later, on July 19, 2017.[1] The Tribunal records show that there were several telephone conversations between the Applicant and Tribunal staff in June and July 2017:

a) On June 16, he asked for help understanding the three possible grounds of appeal;

b) On July 6, he asked whether he could appeal directly to the Federal Courts and was emailed a copy of the relevant form for appealing to the Appeal Division;

c) On July 19, he called and asked for help completing the form that he had recently been sent;

d) On July 21, he called to confirm that the Tribunal had received his fax of 19 pages. He was told that it had not yet been put on file, but that he should call back the following week once there had been time for processing; and

e) On July 28, he called again and was told that his 19-page fax had not been received.

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[1] *Department of Employment and Social Development Act*, paragraph 57(1)(*b*).

[14] On July 28, 2017, the Applicant resent his application requesting leave to appeal, along with a fax confirmation sheet showing that 19 pages had indeed been transmitted to the Tribunal's fax number on July 20, 2017, at 9:35 pm.

[15] The Applicant's application requesting leave to appeal was late regardless of whether it was sent on July 20 or July 28, 2017, though it was only nine days late at the very most. As a result, I must allow an extension of time before this appeal can proceed any further.

Should the Applicant's request for an extension of time be allowed? Yes.

[16] When deciding whether to allow an extension of time, the Tribunal considers and weighs the four factors that were set out in *Canada (Minister of Human Resources Development) v. Gattellaro*[2]:

a) Has the Applicant shown a continuing intention to pursue his appeal?

b) Has he provided a reasonable explanation for the delay?

c) Is there an arguable case on appeal? and

d) Would any other party be prejudiced by the granting of the extension?

[17] Not all four factors need to be met; the overriding consideration is that the interests of justice be served.[3]

[18] On the one hand, the Applicant has not provided an explanation for his delay, though the delay was a very short one. On the other hand, the Applicant's telephone calls to the Tribunal, as outlined in paragraph 13 above, demonstrate a continuing intention of pursuing his appeal. There is also no reason to believe that the Minister would be prejudiced by allowing the extension, since the time for appealing had expired by eight days at the most. The Minister's ability to respond, given its resources and availability of relevant documents, would not be unduly affected by allowing the extension of time to appeal.

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[2] 2005 FC 883.

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

[19] The last factor to consider—whether there is an arguable case on appeal—is often the most important. In assessing this factor, I must keep in mind the narrow role that the *Department of Employment and Social Development Act* (DESD Act) assigns to the Appeal Division. More specifically, the Appeal Division can interfere with a General Division decision only if one of the following errors set out in subsection 58(1) of the DESD Act is established:

a) Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction?

b) Did the General Division err in law in making its decision, whether or not the error appears on the face of the record?

c) Did the General Division base 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?

[20] The legal concepts embedded in these questions are often difficult for people to understand, particularly if they lack legal training or representation. On his application requesting leave to appeal, the Applicant indicated that the General Division made an error of law, but some of the explanations he provided suggest that the General Division might have made errors of fact too (AD1-3 to 4). In any event, I am not bound by the precise grounds for appeal raised by the Applicant[4] and I need not consider all of the grounds that he has raised: just one arguable ground on which the appeal could succeed is sufficient.

[21] In this respect, I note that the Applicant denies having ever received the Minister's initial decision, as communicated in its letter of October 3, 2013 (GD2-19). Under the heading "If you disagree with our decision" the letter clearly states this (at GD2-20): "To ask us to reconsider our decision, you have to write to us **within 90 days** of receiving this letter." [Bold in original, underlining added]

[22] As stated by the General Division, the 90-day time limit comes from subsection 27.1(1) of the *Old Age Security Act*, which refers to a reconsideration request being made "[…] within ninety days after the day on which the person is notified in writing of the [initial] decision or

[4] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at para. 10.

determination, or within any longer period that the Minister may, either before or after the expiration of those ninety days, allow […].” In order for the Minister to extend the time for a person to make a reconsideration request, section 29.1 of the OAS Regulations prescribes that either two or four requirements must be met, depending on whether the request is more or less than 365 days late.

[23] The Applicant argues that the 90 and 365-day timelines do not apply to him, because he never received the Minister’s letter of October 3, 2013, at all. In my view, the Applicant has raised an arguable ground that falls within paragraph 58(1)(*b*) or (*c*) of the DESD Act.

[24] More specifically, the General Division concluded at paragraph 29 of its decision that the Applicant’s request for reconsideration was received “[…] considerably more than 365 days after the day the [Applicant] received the Respondent’s decision dated October 3, 2013 […].” However, given the Applicant’s assertion that he never received the initial decision (raised at both the General and Appeal Divisions (GD12 and AD1-4)), a concern arises that the General Division may have failed to make a clear finding concerning the day on which the Applicant was notified in writing of the Minister’s initial decision. That day is important as it marks the start of the period within which his reconsideration request was due.

[25] As a result, this factor also favours allowing the extension of time.

[26] Having considered the four *Gattellaro* factors and the interests of justice, I am allowing an extension of time to appeal pursuant to subsection 57(2) of the DESD Act.

Should leave to appeal be granted? Yes.

[27] In keeping with subsections 58(2) and (3) of the DESD Act, leave to appeal should be granted unless the appeal has “no reasonable chance of success”.

[28] As part of the *Gattellaro* analysis, I previously considered whether the Applicant has “an arguable case on appeal”. While the wording of these two legal tests is different, courts

have interpreted them as being the same in substance.[5] In both cases, the threshold is a low one: is there any arguable ground upon which the proposed appeal might succeed?

[29] As part of my decision allowing an extension of time, I set out my reasons for concluding that the Applicant has advanced an arguable case on appeal. For the same reasons, leave to appeal must be granted too.

MOVING FORWARD

[30] While I have already stated that one of the arguments raised by the Applicant amounts to an arguable ground on which the proposed appeal might succeed, he is also free to argue the other issues raised in his application requesting leave to appeal. That said, each argument must be tied to at least one of the three possible errors or grounds set out in subsection 58(1) of the DESD Act.

[31] Indeed, I have identified a possible legal error that I also want to raise with the parties and invite them to address it in any additional submissions they might make to the Tribunal.

[32] More specifically, the Minister's refusal to consider the Applicant's reconsideration request was expressed as follows in its letter of February 23, 2016 (GD2-7):

> On October 3, 2013, we sent you a letter explaining our decision. The letter stated that you had 90 days to ask us to reconsider our decision. We cannot consider your request because the 90 days have passed.

[33] As the statutory provisions described above show, the Minister had the discretionary power to extend the 90-day deadline for the Applicant to make his reconsideration request. At paragraph 32 of its decision, the General Division cited *Canada (Attorney General) v. Uppal*[6] for the proposition that the Minister's discretion must be exercised judicially. As a result, the question that arises is this:

a) Was the General Division entitled to embark on its own consideration of whether the reconsideration request had a reasonable chance of success or should its decision have

[5] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12; *Ingram v. Canada (Attorney General)*, 2017 FC 259, at para. 16; *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[6] 2008 FCA 288.

been limited to whether the Minister had exercised its discretion judicially (including whether its discretion was exercised at all)?

CONCLUSION

[34] I have allowed the Applicant's request for an extension of time and granted his application for leave to appeal. It is nevertheless worth stressing that nothing in this decision prejudges the result of the appeal on its merits.

[35] In addition to the questions outlined above, I also invite the parties to provide submissions on whether an oral hearing is required at the merits stage.

Jude Samson
Member, Appeal Division