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

Citation: *D. L. v. Minister of Employment and Social Development,* 2018 SST 82

Tribunal File Number: AD-17-528

BETWEEN:

D. L.

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: January 29, 2018

Canada

DECISION AND REASONS

DECISION

Extension of time and leave to appeal are granted.

OVERVIEW

[1] The Applicant, D. L., was born in 1948 and applied for an Old Age Security (OAS) pension on October 2, 2014. On his application, he stated that he was born in England and that he first entered Canada at Winnipeg, Manitoba, in April 1976. He provided a certificate of Canadian citizenship but offered no other information, although he later claimed that he had worked in Canada as a physician for more than 20 years.

[2] More than once, the Respondent, the Minister of Employment and Social Development (Minister), asked Dr. D. L. to provide additional information to substantiate his residence in Canada. On each occasion, he replied that he could not reasonably be expected to retain supporting documents from as long as 35 years ago, that his memory was poor and that he could not recall the dates of his departures from, and re-entries to, Canada. In July 2015, the Minister refused Dr. D. L.'s application because he had failed to prove that he had met the minimum residence requirement under the *Old Age Security Act* (OASA).

[3] Dr. D. L. appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada. The General Division held a hearing by videoconference and, in a decision dated April 6, 2017, dismissed the appeal because it could not confirm that Dr. D. L. had met the residency requirement under the OASA.

[4] On July 21, 2017, after the 90-day deadline specified in the *Department of Employment and Social Development Act* (DESDA), Dr. D. L. submitted an application requesting leave to appeal from the Tribunal's Appeal Division. In it, he raised several points:

- Members of the Tribunal may be biased against claimants because they are paid by the Department of Employment and Social Development.

- During the hearing, the presiding General Division member referred to Dr. D. L.'s Record of Earnings (ROE), which disclosed his earnings from 1980 to 2013 under the heading "UPE." Dr. D. L. asked the member what "UPE" meant, but he was unable to answer the question. When Dr. D. L. told the member that the document did not accurately reflect his earnings, he was treated "for the rest of the interview as being an unreliable witness."
- In paragraph 37 of its decision, the member noted Dr. D. L.'s testimony that he had performed locums at different times and places in Canada, concluding, "These could well have been from a base in England or the Middle East or elsewhere." Dr. D. L. alleges that this statement amounted to baseless speculation.

ISSUES

[5] My task is to determine whether any of the grounds that Dr. D. L. has put forward fall into the categories specified in the DESDA and whether any of them would have a reasonable chance of success on appeal.

Issue 1: Should Dr. D. L. receive an extension of time in which to file his application for leave to appeal?

Issue 2: Does Dr. D. L. have an arguable case that the General Division

(i) was biased against him?

(ii) dismissed his earnings and testimony without good reason?

(iii) engaged in unwarranted speculation about his Canadian locums?

ANALYSIS

Issue 1: Should Dr. D. L. receive an extension of time?

[6] Pursuant to subsection 57(1) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[7] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that the General Division's decision was mailed to Dr. D. L. at his address of record on April 7, 2017. According to paragraph 19(1)(*a*) of the *Social Security Tribunal Regulations*, a decision is deemed to have been communicated to a party 10 days after the date on which it was mailed. Dr. D. L. submitted his request for leave to appeal on July 21, 2017—five days after the presumptive deadline had elapsed.

[8] Having reviewed the submissions, I have come to the conclusion that an extension of time is warranted in this case. In *Canada v. Gattellaro*,[1] the Federal Court set out four factors to consider in deciding whether to allow further time to appeal:

(i) Whether there is a reasonable explanation for the delay;

(ii) Whether the applicant demonstrates a continuing intention to pursue the appeal;

(iii) Whether allowing the extension would cause prejudice to other parties; and

(iv) Whether the matter discloses an arguable case.

[9] The weight to be given to each of the *Gattellaro* factors may differ from case to case, and other factors may be relevant. However, the overriding consideration is that the interests of justice be served.[2]

(i) Reasonable explanation for the delay

[10] In a letter dated November 23, 2017, Dr. D. L. wrote that the application for leave to appeal was submitted late because the General Division's decision was delayed in being communicated to him.

[11] Although this explanation is vague, I nonetheless find it reasonable, not least because Dr. D. L.'s application for leave to appeal was late by only five days.

(ii) Continuing intention to pursue the appeal

[12] As not a great deal of time had passed between the expiry of the 90-day appeal period and the late submission of the application requesting leave to appeal, I am willing to give

[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

Dr. D. L. the benefit of the doubt on this factor and find that he had a continuing intention to pursue the appeal.

(iii) Prejudice to the other party

[13] I find it unlikely that permitting Dr. D. L. to proceed with his appeal at this late date would prejudice the Minister's interests, given the relatively short period of time that has elapsed since the expiry of the statutory deadline. I do not believe that the Minister's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

Issue 2: Does Dr. D. L. have an arguable case?

[14] An applicant seeking an extension of time must show that they have at least an arguable case on appeal at law. As it happens, this is also the test for leave to appeal.

[15] There are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal.[3] Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.[4] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case.[5]

[16] Having reviewed Dr. D. L.'s submissions against the record, I see an arguable case on two of the three grounds that he has raised.

(i) Bias

[17] The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[6] has stated that the test for bias is: "What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude?" A real likelihood of bias must be demonstrated, with a

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[3] DESDA at subsections 56(1) and 58(3).
[4] DESDA at subsection 58(1).
[5] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[6] *Committee for Justice and Liberty v. Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.

mere suspicion not being enough. Not every favourable or unfavourable disposition attracts the label of impartiality. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues.

[18] Dr. D. L. submits that the mere fact that the Tribunal and the Respondent to this proceeding fall within the same administrative umbrella within the federal government gives rise to bias and prevents claimants like himself from receiving a fair hearing. However, beyond this broad allegation, he has not offered details on any specific incident indicating bias. In the absence of definite evidence that the General Division prejudged the appeal, I see no arguable case on this ground.

(ii) Earnings and testimony

[19] Dr. D. L. alleges that the General Division discounted, without good reason, his evidence of Canadian earnings and then dismissed his testimony because he questioned the accuracy of the ROE.

[20] I see an arguable case on this ground. Dr. D. L.'s ROE, which can be found at GD2-32 of the case file, indicates earnings from 1980–95 and from 2008–13, inclusively. In its decision, the General Division describes this document as follows:

> [21] A "Record of Earnings" shows income and contribution to the Canadian Pension Plan for the years 1980 through 1995 and 2008 through 2013 for a total of 23 years. The years 1996 through 2007 show no earnings. There is no documentation showing where he was working, in which country or where he was living when working.
>
> […]
>
> [25] The Appellant stated that the Unadjusted Pensionable Earnings on his Record of Earnings do not reflect his actual earnings over the period from 1980 to 2013. There was no explanation for the discrepancy.

[21] Although the General Division accurately identified "UPE" as an acronym for "unadjusted pensionable earnings" in its decision, my preliminary review of the audio recording of the hearing indicates that Dr. D. L. is correct that the member did not know at first what

"UPE" stood for.[7] Of greater significance, however, is that the member appears to have misinterpreted the ROE. In every year for which Dr. D. L. recorded earnings, there was an "M" marked next to the amount. This letter stands for "maximum" and is the code that Service Canada uses to show that a Canada Pension Plan contributor has reported income above a certain threshold—one that permits the government to deduct the maximum CPP contributions under the law. The amounts reported on the ROE are not necessarily Dr. D. L.'s actual earnings for the listed years; instead, they represent a statutory maximum that is adjusted every year.

[22] There are indications in the recording that the General Division member believed he was looking at Dr. D. L.'s actual earnings for the years he worked in Canada. At various points in the recording, he can be heard telling Dr. D. L.:

> 16:30: The earnings are fairly minor, so that looks like it could possibly be a locum you were on.
>
> 17:28: Those are your gross earnings.
>
> 18:20: These are from Canada Revenue Agency and by legislation I am obliged to accept them as being factual.
>
> 18:40: Both your salary and your personal billings should be accumulated on this sheet of paper.
>
> 18:56: Even as you go through all those years right up to 2013, the earnings—I think you said you were billing OHIP—does not appear to be full-time work.
>
> 19:49: All I know is, those were the earnings that were reflected in the income tax returns that you would have filed.

[23] Dr. D. L. was understandably unfamiliar with ROEs, but he pushed

> back: 18:10: Are you sure you have these numbers right?
>
> 18:53: I don't know why they are so low, I just don't know.
>
> 22:50: I don't know what these UPE numbers mean but they do not reflect my total income. I don't know how they are derived, what they are…. I was under full-time employment.

[7] Heard at the 17:20 mark. Later, it appears the member called for a recess to look it up.

[24] Ultimately, when the General Division addressed Dr. D. L.'s 23 years of Canadian earnings in its decision, it was dismissive:

> [37] […]. The earnings of the Appellant (rejected as inaccurate by the Appellant) do not form the basis of the decision of this Tribunal. It is the absence of other evidence proving residence that has influenced the Tribunal.

[25] The General Division member did not explain why he chose to completely disregard the ROE, except to note that Dr. D. L. himself rejected it as inaccurate. However, as the recording indicates, Dr. D. L. did not dispute the number of years it showed him working in Canada—only the amounts that it showed him earning, which he believed were incorrect. Dr. D. L. took issue with the ROE only to the extent that, in his view, it understated the income he had earned in Canada, thereby undermining his claim that he held full-time jobs and was therefore a resident. I see an argument that the General Division member may have based its decision on an erroneous finding that the ROE reflected Dr. D. L.'s actual income during the years in question. I also think it is possible that Dr. D. L.'s purported failure to explain the supposed discrepancy between the numbers on the ROE and what he claimed to be earning coloured the General Division's view of his credibility as a whole.

(iii) Speculation about locums

[26] This submission is inextricably linked with the previous ground of appeal. The General Division implicitly acknowledged that there was evidence of Canadian earnings over 23 years, but the question remained: What, then, was Dr. D. L. doing here if he was not a resident? In paragraph 32, the General Division wrote that "[i]t would be speculation…without official records of employment and related proof of residence, to make a finding that employment is equivalent to 'residence,'" yet the General Division engaged in its own bit of speculation in paragraph 37, when it mused that Dr. D. L. may have jetted in and out of Canada from an overseas base for serial locums over a period of decades.

[27] The General Division rejected Dr. D. L.'s oral evidence that he was a full-time resident of Canada with full-time jobs during the period in question, yet it never made a finding about

his credibility. I think it is worth investigating whether the General Division developed a theory about Dr. D. L.'s career that was, perhaps, not supported by the available facts.

[28] I see an arguable case on this ground of appeal.

CONCLUSION

[29] Having weighed the four *Gattellaro* factors, I have determined that this is an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. Above all else, I find that Dr. D. L. has raised an arguable ground that the General Division based part of its decision on erroneous findings of fact, and I am compelled, in the interests of justice, to extend time and, furthermore, to grant leave to appeal.

[30] Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[31] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division

REPRESENTATIVE:	D. L., for himself