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

Citation: *W. D. v. Minister of Employment and Social Development*, 2018 SST 412

Tribunal File Number: AD-18-119

BETWEEN:

**W. D.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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Leave to Appeal Decision by: Neil Nawaz

Date of Decision: April 12, 2018

Canada

## DECISION AND REASONS

### DECISION

[1] Extension of time and leave to appeal are refused.

### OVERVIEW

[2] The Applicant, W. D., receives an Old Age Security pension. In January 2013, he applied for a Guaranteed Income Supplement (GIS) under the *Old Age Security Act* (OASA). His application was approved effective the following month, and he received a retroactive payment for the 11-month period of February 2012 to January 2013—the maximum amount permitted under the law. At the time, the Respondent, the Minister of Employment and Social Development (Minster), informed the Applicant that the GIS would normally be renewed automatically, provided that he filed his income tax return by April 30 each year.

[3] The Applicant did not file an income tax return for 2013. In March 2016, the Applicant submitted GIS applications for the payment periods of July 2014 to June 2015, and July 2015 to June 2016. The Minister approved the applications based on the Applicant's income for 2013 and 2014 and resumed his benefits, paying him back to April 2015, the requisite maximum 11 months of retroactive benefits.

[4] As a result, the Applicant received no GIS payments from July 2014 to March 2015. After the Minister refused his request for reconsideration, he appealed to the General Division of the Social Security Tribunal. Following a hearing by teleconference, the General Division dismissed the appeal. In a decision dated October 3, 2017, the General Division found that the Minister had acted within the law by limiting the Applicant's retroactive GIS payments. It also found that it had no jurisdiction to provide an equitable remedy.

[5] On February 20, 2018, after the statutory 90-day deadline, the Applicant submitted an application for leave to appeal to the Tribunal's Appeal Division, claiming that the presiding General Division member did not understand the challenges of running a business in Ontario.

[6] Having reviewed the record, I have concluded that this is not a suitable case in which to permit an extension of time.

## ISSUES

[7] I must decide the following related issues:

Issue 1: Should the Applicant receive an extension of time in which to file his application for leave to appeal?

Issue 2: Has the Applicant presented an arguable case that the General Division erred in limiting him to 11 months of retroactive GIS payments?

## ANALYSIS

### Issue 1: Should the Applicant receive an extension of time?

[8] Pursuant to the *Department of Employment and Social Development Act* (DESDA),[1] 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.

[9] The record indicates that the General Division issued its decision on October 3, 2017, and it was mailed to the Applicant's address of record on the same day. It is not known when the Applicant actually received the decision but, according to s. 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. The Tribunal received the Applicant's application for leave to appeal on February 20, 2018—more than four months later and well after the 90-day filing deadline set out in s. 57(1)(*b*) of the DESDA.

[1] DESDA at s. 57

[10] Having reviewed the submissions, I have come to the conclusion that an extension of time is not warranted in this case. In *Canada v. Gattellaro*,[2] 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.

[11] 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.[3]

**(i) Reasonable explanation for the delay**

[12] The Applicant offered no explanation for why his request for leave to appeal was late, although the application form specifically asked for one. Still, I am willing to give the Applicant the benefit of the doubt on this factor, noting his evident struggles to maintain his rental business and his related complaints about the burden of government paperwork.

**(ii) Continuing intention to pursue the appeal**

[13] Although the Applicant did not file his application for leave to appeal until more than a month after the expiry of the statutory limitation, I am willing to assume that he had a continuing intention to pursue the appeal. In doing so, I note that his application was not excessively late—only a little more than a month past the deadline.

**(iii) Prejudice to the other party**

[14] I find it unlikely that permitting the Applicant 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.

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

**(iv) Arguable case**

[15] An applicant seeking an extension of time must show that they have at least an arguable case at law on appeal. As it happens, this is also the test for leave to appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.[4]

**Issue 2: Does the Applicant's appeal raise an arguable case?**

[16] As much as I may sympathize with the Applicant's financial plight, my hands are tied by the OASA and the laws that govern the Tribunal.

[17] 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.[5] Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.[6] As the Federal Court of Appeal has determined, a reasonable chance of success is akin to an arguable case at law.[7]

[18] The General Division correctly noted that s. 11(7)(*a*) of the OASA limits payment of the GIS to no "more than eleven months before the month in which the application is received" by the Minister. After the benefits from his first GIS application ended, the Applicant submitted new GIS applications in March 2016. As a result, he was statute-barred from receiving more than 11 months of retroactive payments following approval of his applications.

[19] The Applicant argued before the General Division that he was late in filing his income tax returns because he could not afford to hire a qualified accountant to prepare financial statements for his business. My review of its decision indicates that the General Division was aware of this argument but determined that it had no bearing on the question of retroactive GIS payments. The issue then became whether the General Division had the discretion to order what

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[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63
[5] DESDA at ss. 56(1) and 58(3)
[6] DESDA at s. 58(1)
[7] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

it considered to be a fair result. In the end, it decided that it did not, and I see no arguable case that it erred in arriving at this conclusion.

[20] As administrative tribunals, both the General Division and the Appeal Division are limited to the powers conferred by their enabling legislation—in this case, the DESDA. We lack the authority to simply ignore the letter of the law and order a solution that we think is fair. This power, known as "equity," has traditionally been reserved for the courts, although they will typically exercise it only if there is no adequate remedy at law. *Canada v. Tucker*,[8] among many other cases, has confirmed that an administrative tribunal is not a court but a statutory decision-maker and, therefore, not empowered to provide any form of equitable relief.

[21] In my view, the Applicant has not raised an arguable case.

**CONCLUSION**

[22] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. Although I found that three of the *Gattellaro* factors favoured the Applicant, they were outweighed, in my view, by his lack of an arguable case on any ground. This last factor was decisive; I see no point in advancing this application to a full appeal that would be doomed to fail.

[23] In consideration of the *Gattellaro* factors and in the interests of justice, I am refusing this request to extend the time to appeal.

Member, Appeal Division

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| REPRESENTATIVE: | W. D., self-represented |

[8] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278