Citation: *M. C. R. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 42

Tribunal Number: GT-118865

BETWEEN:

M. C. R.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section
Summary Dismissal

SOCIAL SECURITY TRIBUNAL MEMBER:	Raymond Raphael
PRE-HEARING CONFERENCE DATE	December 15, 2014
TYPE OF HEARING:	Teleconference
DATE OF DECISION:	December 22, 2014

PERSONS IN ATTENDANCE

M. C. R.: Appellant

Vanessa Luna: counsel for the Respondent

Daren Lische: attending on behalf of the Respondent

DECISION

[1] The Tribunal finds that the charter challenge has no reasonable chance of success; therefore, the appeal is summarily dismissed.

INTRODUCTION

[2] The Appellant's applications for CPP survivor's pension, survivor's children's benefits, and death benefits were date stamped by the Respondent on September 6, 2011. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

ISSUE

[3] The Tribunal must decide whether the appeal has a reasonable chance of success. Subsection 53 (1) of the *Department of Employment and Social Development Act* (DESD Act) requires that an appeal be summarily dismissed if the Tribunal is satisfied that the appeal has no reasonable chance of success.

[4] While "no reasonable chance of success" has not yet been defined by a Court for the purposes of the DESD Act, guidance can be obtained from Court decisions dealing with similar provisions in other contexts. In the context of a motion to strike a third party notice, the Supreme Court of Canada in *R. v Imperial Tobacco Ltd*, 2011 SCC 42 at paragraph 17, held that a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleadings disclose no cause of action. The Supreme Court of Canada gave further guidance for applying the test when it stated at paragraphs 19 and 20 as follows:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

> This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[5] This Tribunal has also been guided by the decision of the Federal Court of Appeal in *Fotinov et al v. Royal Bank of Canada,* 2014 FCA 70 which indicates that the test for preliminary dismissal of an appeal is high, that for such a motion to succeed it must be plain and obvious that the appeal has no reasonable chance of success, and that it is clearly bound to fail. The Tribunal has been further guided by the decision of the Trial Division of the Federal Court in *Imperial Cabinet (1980) Co. Ltd v. Her Majesty the Queen in Right of Canada*,[1995] 1 FC 260 which indicates that for there to be a reasonable chance of success, "It must be shown that there is something to the case so that, if sent to trial, there is some realistic prospect that the action will succeed."

THE LAW AND APPLICABLE STATUTORY PROVISIONS

[6] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[7] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[8] Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[9] Subsection 3 (1) of the Regulations provides that the Tribunal

(a) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit; and

(b) may, if there are special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision.

[10] Section 15 (1) *Canadian Charter of Rights and Freedoms* provides as follows:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[11] Section 44(1)(c) of the CPP provides that a death benefit shall be paid to the estate of a deceased contributor who has made contributions for not less than the minimum qualifying period.

[12] Section 44 (1)(d) provides that a survivor's pension shall be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period.

[13] Section 44 (1)(f) provides that an orphan's benefit shall be paid to each orphan of a deceased contributor who has made contributions for not less than the minimum qualifying period.

[14] Section 44(3) provides that for the purposes of paragraphs 44 (1) (c), (d) and (f) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if the contributor has made contributions during the contributor's contributory period

(a) for at least one-third of the total number of years included either wholly or partly within his contributory period, excluding from the calculation of that contributory period any month in a year after the

year in which he reaches sixty-five years of age and for which his unadjusted pensionable earnings were equal to or less than the basic exemption for that year, but in no case for less than three years; or

(b) for at least ten years.

[15] Section 49 of the CPP provides that a contributor's contributory period is the period commencing January 1, 1966 or when he reaches eighteen years of age, whichever is later, and ending in the month when the contributor dies, excluding any month that was excluded from the contributor's contributory period by reason of disability.

[16] Section 107 (1) of the CPP provides that where, under any law of a country other than Canada, provision is made for the payment of old age or other benefits including survivors' or disability benefits, the Minister may, on behalf of the Government of Canada, on such terms and conditions as may be approved by the Governor in Council, enter into an agreement with the government of that country for the making of reciprocal arrangements relating to the administration or operation of that law and of this Act, including, without restricting the generality of the foregoing, arrangements relating to

> (a) the exchange of such information obtained under that law or this Act as may be necessary to give effect to any such arrangements,
>
> (b) the administration of benefits payable under this Act to persons resident in that country, the extension of benefits to and in respect of persons under that law or this Act and the increase or decrease in the amount of the benefits payable under that law or this Act to and in respect of persons employed in or resident in that country, and
>
> (c) the administration of benefits payable under that law to persons resident in Canada, the extension of benefits to and in respect of persons under that law or this Act and the increase or decrease in the amount of the benefits payable under that law or this Act to and in respect of persons employed in or resident in Canada…

PRELIMINARY MATTER

[17] The Tribunal recognizes that section 22 of the Regulations has not been complied with since no notice in writing was given to the Appellant of the Tribunal's intent to summarily dismiss the appeal. The Tribunal is satisfied, however, that having regard to

subsection 3(1)) of the Regulations this procedural requirement should be dispensed with. The Appellant was served with the Respondent's request that the Tribunal summarily dismiss the appeal and supporting materials, and she was given the opportunity to file written responding materials. She participated in the teleconference and made oral submissions in response to the motion.

[18] The Tribunal is satisfied that the requirements of fairness and natural justice have been met, that the Appellant has had ample notice of the request to dismiss, and that she has had a full opportunity to respond. Accordingly, there are special circumstances justifying dispensing with the requirement of notice in writing from the Tribunal pursuant to section 22 of the Regulations.

BACKGROUND AND EVIDENCE

[19] The Appellant is the widow of the late M. O. who was born in Peru in December 1961, and who died in an accident in August 2011. M. O. immigrated to Canada from Peru in 2003. The Appellant and her husband have three dependent children who were born in 1997, 1999 and 2007. The Record of Earnings (ROE) indicates that Mr. M. O. made contributions to the CPP for the years 2005 to 2011 (seven years).

[20] The Respondent denied the Appellant's applications because Mr. M. O. had only made contributions for seven years, and that a minimum of ten years contributions was required. The Appellant requested a reconsideration on the basis of economic and compassionate grounds. The Respondent denied the reconsideration request on the basis that Mr. M. O. had not made the required minimum 10 years contributions in Canada, and that his prior employment in Peru could not be considered because there is no reciprocal agreement between Canada and Peru.

[21] In her notice of appeal the Appellant indicated that her husband died as a victim of an unexpected motor vehicle accident when he was 49 years old; that her husband emigrated to Canada eight years before his death; and that his minimal years of required contributions should be shortened so as to not use his 18th birthday because he was not a Canadian at the age of 18, and there is no agreement with Canada with respect to his contributions.

[22] On October 19, 2012 the Appellant wrote to the OCRT taking the position that the eligibility requirements in section 44 (3) of the CPP violate right set out in the Canadian Charter of Rights and Freedoms against age discrimination and that section 107 (1) violates the right against ethnic discrimination.

[23] She argued that there was age discrimination because there was not the same minimum number of years for everyone, and that this discriminated against older people. She also argued that the right against ethnic discrimination was violated because not all Canadian immigrants' countries are enrolled in the social agreement with the CPP, and that the list of reciprocal agreements indicates discrimination against poor non-European countries. She argued that this discriminates on the basis of a person's original country, and that to avoid discrimination the provisions should exclude the time that a person was not a Canadian citizen, regardless of their original country. In a letter to the SST dated June 25, 2013 the Appellant reiterated her position that the impugned provisions violate the Charter rights against age and ethnic origin discrimination. She reiterated her position that the same years should apply for everyone by excluding the time a person was not a Canadian citizen, regardless of their country of origin.

[24] On October 17, 2013 the Respondent served a Notice of Request pursuant to s. 4 of the SST regulations that the Charter claim be summarily dismissed on the basis that the issue has already been decided by the Federal Court of Appeal in *Lezau v. Canada (Minister of Social Development),* 2008 FCA 99, which upheld the Pension Appeals Board decision in *Elena Tan, Sukhwinder Bal, Joginder Dhaliwal, Eva K. Li, Siu Wan Ellen Tam and Elisabeta Lezau v. Minister of Social Development,* CP20525, CP21817, CP22316, CP22452, CP22453 and CP23253, (December 8, 2006) (P.A.B.).

[25] On October 10, 2014 the Tribunal sent notice of a pre-hearing conference to be held by way of teleconference on December 15, 2014 for oral submissions by the parties with respect to the Notice of Request. The notice gave the Appellant the opportunity to file responding written submissions on or before November 30, 2014. The Appellant did not file responding written submissions

RESPONDENT'S SUBMISSIONS ON PRE-HEARING CONFERNCE

[26] Ms. Luna submitted that the Federal Court of Appeal decision in *Lezau* supra is similar to this appeal. In that case, the deceased contributor did not have sufficient years of contributions, and there was no reciprocal agreement with Romania. In that case, a charter analysis was done and the comparator group was all immigrants who come to Canada from a non-agreement country after their 18th birthday. In this case both the deceased contributor and the surviving spouse, fall within that category. Ms. Luna referred to following comments of the Federal Court of Appeal on the Pension Appeals Board decision:

> The Board noted that the contributory rules to the Plan apply to all Canadians, immigrants and non-immigrants. It acknowledged that the Plan created a differential treatment between contributors who have made sufficient contributions and those who have not. However, it rightly pointed out that this is an attribute of any social benefit legislation that requires a person to qualify for benefits by meeting certain criteria.
>
> Looking at the disadvantage alleged by the applicant in this case, it concluded that the disadvantage was not suffered because of any personal characteristics or of specific targeting. In the Board's view, there was no violation of human dignity.
>
> Moreover, the Board studied the proposal made by the applicant that the contributory period begin only after arrival in Canada and concluded that "the net result would be that each immigrant would be treated differently from not only non-immigrants but other immigrants who may have arrived in Canada at an earlier age than they did."
>
> In the end, the Board concluded that the differential treatment of contributors to the Plan did not amount to discrimination within the meaning of section 15 of the Charter.

[27] Ms. Luna submitted that in this case, the Appellant is attempting to put forward the very same arguments already decided by the Federal Court of Appeal, and the Pension Appeals Board. She submitted that the doctrine of stare decisis applies, and that the Federal Court of Appeal decision in *Lezau* is binding on the SST.

[28] With respect to Section 107 of the CPP, Ms. Luna argued that this provision was considered in detail in the Pension Appeals Board decision and referred the Tribunal to paragraphs 29 to 31 of that decision which sets out the four essential conditions that must be met before a reciprocal agreement is entered into, and concludes as follows:

> It was stressed that international agreements cannot modify the provisions of the Canada Pension Plan. They can only extend the coverage by coordinating the operation of the Plan with the other country's programs. By authorizing the Minister of Human

> Resources Development to conclude international reciprocal social security agreements, Parliament did not intend to create special qualifying rules.
> International social security agreements enable individuals to meet the minimum qualifying conditions set out under domestic law by adding periods of contributions to both the Plan and the comparable programs of the other country to meet the contributory requirements under the Canada Pension Plan.

[29] Ms. Luna also referred the Tribunal to paragraph 54 of that decision which states:

> If, as proposed by the Appellants and the Respondent Bal, the contributory clock should be interpreted to start running against immigrants only when they arrived in Canada, the net result would be that each immigrant would be treated differently from not only non-immigrants but other immigrants who may have arrived in Canada at an earlier age than they did. For example, it would be open for an immigrant who immigrated to Canada at age 30 to argue that he or she has been treated differently from an immigrant who immigrated to Canada at age 40 and so on. Students who have deferred entry into the work force in order to pursue their university studies and are subject to the same starting rule of 18 years of age could argue that they are being treated differently from immigrants who have an age of entry starting time. Similarly, those with long periods of unemployment or illness could argue that they are being treated differently from immigrants. Finally, those immigrants who came to Canada from an agreement country and entered the work force at a later age could argue that they have received differential treatment from those immigrants who came to Canada from a non-agreement country. In my view, the contributory rules do not create differential treatment between non-immigrant and immigrant contributors.

[30] Ms. Luna stated that although the Appellant's case is a very sympathetic, the CPP is a contributory plan and not a social welfare scheme and, accordingly, in order to receive the benefits it is necessary for all required contributions to have been made in accordance with the CPP provisions.

[31] She submitted that in this case, the Appellant is attempting to put forward the same arguments already decided by the Federal Court of Appeal, and the Pensions Appeal Board. She further submitted that the doctrine of stare decisis applies, and that the Federal Court of Appeal decision in *Lezau* is binding on the SST.

[32] Ms. Luna referred to s. 53 (1) of the DESD Act, and concluded that the appeal must be summarily dismissed because it has no reasonable chance of success.

THE APPELLANT'S SUBMISSIONS ON PRE-HEARING CONFERENCE

[33] The Appellant submitted that the cases relied upon by the Respondent are different because there was no mention in those cases of age discrimination. She submitted cases

relied only on there not being enough years of contributions, and did not consider that the formulas used created age discrimination because people are being treated differently based on their age. She noted that if two people arrive in Canada on the same day, and work the same number of years, one person may receive benefits while another doesn't based solely on their age. She stated that the only reason for this is that one person may be older than the other. She suggested that there is a distinction between the situation where persons born in Canada want to stay in school longer because this is the person's choice. She contrasted this with the situation of immigrants who are not in control, because of immigration requirements, of when they can immigrate to Canada.

[34] She noted that the reciprocal agreements create ethnic discrimination against people who come from a poor country, and that there are reciprocal agreements with only one country from South America and none from Africa. She stated that the CPP should not be telling people that they should not die before a certain time in order to qualify, and to tell immigrants that they should wait longer before they can die. She submitted that the impugned provisions are against human rights, and that she is just asking for justice.

ANALYSIS

[35] In determining this matter, the Tribunal has been mindful that this is a preliminary request to dismiss prior to a full hearing on the merits. As set out in paragraphs 3 to 5 above, the Tribunal must determine whether the appeal has no reasonable chance of success, assuming that the facts alleged by the Appellant are true.

[36] The Appellant acknowledges that Mr. M. O. does not meet the minimum contributory provisions in accordance with the CPP. Her position, however, is that these provisions infringe the Charter because of ethnic and age discrimination. It is clear that this is a matter about which the Appellant has very strong feelings, and that she genuinely feels that she has been discriminated against because her late husband immigrated to Canada from Peru, a non-reciprocal agreement country.

[37] The difficulty facing the Appellant (and what the Tribunal considers to be an insurmountable barrier) is that the charter issues raised by the Appellant have already been

thoroughly canvassed and dismissed by the Federal Court of Appeal in *Lezau*, and that decision is binding on this Tribunal. Although the Appellant alleges that age discrimination was not considered, it is clear that this was this was carefully considered by the Pensions Appeal Board decision (see paragraph 29 above), which was affirmed by the Federal Court of Appeal.

[38] The Tribunal was also guided by the Pension Appeals Board decision in *Inderjit Sahota v. Minister of Human Resources and Skills Development* (November 21, 2011) CP22317 (PAB). In that case the Pensions Appeal Board held that the Federal Court of Appeal decision in Lezau was bindng, and dismissed the Appellant's claim that sections 44 and 49 of the CPP are discriminatory and contrary to section 15 (1) of the Charter, on the basis of age and national origin of the deceased contributor.

[39] The Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

[40] The Respondent's request that the Tribunal summarily dismiss the constitutional challenge is allowed.

[41] Accordingly, the appeal is summarily dismissed.

Raymond Raphael
Member, General Division