Citation: *C. S. v. Minister of Employment and Social Development,* 2015 SSTAD 974

Appeal No. AD-15-236

BETWEEN:

C. S.

Appellant

and

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

Respondent

and

P. P.

Interested Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: August 12, 2015

INTRODUCTION

[1] The Appellant appeals a decision dated April 3, 2015 of the General Division, whereby it summarily dismissed her application for a division of unadjusted pensionable earnings. The General Division summarily dismissed her appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an application requesting leave to appeal on May 7, 2015 (the "Notice of Appeal"). No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* ("DESDA"), as there is an appeal as of right when dealing with a summary dismissal from the General Division.

[3] The Appellant and Respondent have filed written submissions. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to section 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[4] The issues before me are as follows:

1. What is the applicable standard of review when reviewing decisions of the General Division?

2. Did the General Division err in summarily dismissing the Appellant's claim for a division of unadjusted pensionable earnings?

    (a) Did the General Division identify the correct test for a summary dismissal?

    (b) If so, was the General Division's application of the test to the facts by all accounts reasonable?

FACTUAL OVERVIEW

[5] The Appellant applied for a division of unadjusted pensionable earnings in July 2012. The Respondent denied the application at both the initial and reconsideration levels. On

January 11, 2013, the Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals ("OCRT").

[6] Under section 257 of the *Jobs, Growth and Long-Term Prosperity Act,* any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the OCRT transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal.

[7] On February 23, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

i. The Appellant applied for a division of unadjusted pensionable earnings of a former spouse pursuant to Section 55.1(a) of the CPP;

ii. The Appellant married her former spouse on May 31, 1975 at X, British Columbia;

iii. The Appellant obtained a Divorce Order on November 22, 1991;

iv. A written agreement respecting property division was entered into by the Appellant and her former spouse on November 27, 1990;

v. The written agreement contained a provision that expressly mentioned the CPP, and indicated the intention of the persons that there be no division of unadjusted pensionable earnings;

vi. Section 127 of the *Family Law Act of BC* expressly permits spouses to make a written agreement respecting the division of benefits under a plan such as the CPP; and

vii. The written agreement had not been invalidated by a Court Order.

[8] The General Division invited the Appellant to provide detailed written submissions by no later than March 31, 2015, explaining why her appeal had a reasonable chance of success. The Appellant did not respond to the invitation or provide any submissions.

[9] On April 3, 2015, the General Division rendered its decision. The General Division relied upon the following provisions, in coming to its decision:

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

ii. Section 22 of the *Social Security Tribunal Regulations,* which states that before summarily dismissing an appeal, the General Division must give notice in writing to the appellant and allow the appellant a reasonable amount of time to make submissions.

iii. Section 55.1 of the *Canada Pension Plan,* which provides that a division of unadjusted pensionable earnings shall take place upon the application of a party following the granting of their divorce judgment; and

iv. Subsection 55.2(3) of the *Canada Pension Plan,* which allows an exception to section 55.1, where:

   a. A written agreement entered into between the spouses on or after June 4, 1986, contains a provision that expressly mentions the CPP and indicates an intention of the spouses that there be no DUPE under section 55.1;

   b. The provision in the written agreement is expressly permitted under the provincial law that governs the agreement;

   c. The agreement was entered into before the day of the application for a division, and before the rendering of the judgment granting a divorce;

   d. The provision in the written agreement has not been invalidated by a court order; and

e. Section 62 of the *B.C. Family Relations Act*, R.S.B.C. 1996, c. 128, which provides that a written agreement, entered into on or after June 4, 1986, may provide that, despite the *Canada Pension Plan*, there be no division of unadjusted pensionable earnings.

[10] On May 7, 2015, the Appellant filed an appeal from the decision of the General Division. On June 19, 2015, counsel for the Respondent filed submissions.

SUBMISSIONS

[11] The Appellant queries why her application for a division of unadjusted pensionable credits was denied. She advised in the Notice of Appeal that her disability is ongoing and that she will not improve with age. She notes that she cared for her children and worked, so questions the amount of the disability pension. She indicated that she was interested in applying for an early retirement pension but was of the understanding that she might not be permitted to do so if she were already in receipt of a disability pension. The Appellant did not make any specific allegations of error on the part of the General Division in its summary dismissal of her appeal before it, nor did she address any of the issues raised by the General Division in its decision.

[12] Section 36 of the *Regulations* permits the parties to file submissions with the Appeal Division, within 45 days after the day on which the appeal is filed. The Appellant did not file any further submissions within this timeframe. The Respondent filed written submissions on June 19, 2015.

[13] Counsel for the Respondent submits that the General Division correctly stated the test for a summary dismissal under section 53 of the DESDA, as well as the law regarding exceptions to divisions of unadjusted pensionable earnings under the *Canada Pension Plan.*

[14] Counsel for the Respondent submits that the General Division did not err in its application of the law to the facts, which are not in dispute. Counsel notes that the Appellant and her ex-husband entered into a spousal agreement on or after June 4, 1986. This agreement contains provisions that expressly mention the *Canada Pension Plan* and indicates the intentions of the parties to waive their rights to each other's pensions. Counsel submits that the

provision of the spousal agreement is expressly permitted under the provincial law in which the agreement was signed, which in this case, was British Columbia, where both parties reside. Counsel submits that the Province of British Columbia has enacted provincial legislation to allow a spousal agreement to be binding on the Minister of Employment and Social Development. Counsel submits that, given these considerations, the appeal was therefore left without any chance of success and was properly summarily dismissed.

[15] Counsel submits that the decision of the General Division is entirely reasonable as it is transparent, intelligible and is the only acceptable outcome based on the law and the facts. Counsel further submits that as the General Division correctly stated the law and reasonably applied it to the facts, the decision contains no reviewable error to permit the intervention of the Appeal Division. Counsel requests that the appeal be dismissed.

ISSUE 1: STANDARD OF REVIEW

[16] Subsection 58(1) of the DESDA sets out the grounds of appeal as follows:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) The General Division 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.

[17] Counsel for the Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. Counsel submits that for questions of law, the Appeal Division ought not to show any deference to decisions of the General Division and should apply a correctness standard.

[18] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law generally are determined on the correctness standard. The

correctness standard is generally reserved for jurisdictional or constitutional questions, or questions which are of central importance to the legal system as a whole and outside the expertise of the tribunal. When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis. Ultimately if it disagrees with the decision of the decision-maker, the court must substitute its own view as to the correct outcome. The correctness standard is vital as it promotes and ensures just decisions, consistency and predictability in the law.

[19] Questions of fact and mixed questions of fact and law are decided on the reasonableness standard. Such a review necessarily attracts a deferential standard. *Dunsmuir* set out a list of factors which would lead to the conclusion that a decision- maker should be afforded deference and that a reasonableness test applies:

- A privative clause; this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of the law. A question of law that is of "central importance to the legal system . . . and outside the … specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 777, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[20] The Supreme Court of Canada in *Smith v. Alliance Pipeline*, [2011] SCC 7, [2011] S.C.R. 160, at para. 26, also set out the scope of the standard of reasonableness to include issues that (1) relate to the interpretation of the administrative tribunal's "home statute" or statutes closely connected to its function with which it has familiarity and expertise, (2) raise matters of fact, discretion or policy or (3) involve inextricably intertwined legal and factual issues.

[21] The Supreme Court of Canada set out the reasonableness approach in *Dunsmuir* at paragraph 47:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons

> and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] Thus, the applicable standard of review will depend upon the nature of the alleged errors involved. For instance, an error of law could attract either a correctness or reasonableness standard.

ISSUE 2 – DID THE GENERAL DIVISION ERR IN CHOOSING TO SUMMARILY DISMISS THE APPELLANT'S CLAIM FOR A DIVISION OF UNADJUSTED PENSIONABLE EARNINGS?

[23] Counsel submits that the main issue is whether the appeal has a reasonable chance of success, which involves a question of mixed fact and law. (Presumably, that refers to the main issue that had been before the General Division.) Counsel submits that, as such, the Appeal Division should review the decision of the General Division on a reasonableness standard.

[24] Counsel submits that if the General Division erred in its statement of the test for a summary dismissal or statement of the law with respect to subsection 55.2(3) of the *Canada Pension Plan* (the provisions relating to the division of unadjusted pensionable earnings), the Appeal Division should show no deference to the General Division, as these involve questions of law. Counsel submits however that the General Division appropriately identified the test for a summary dismissal and also correctly identified the law with respect to whether a division of unadjusted pensionable earnings is applicable.

[25] The first step required the General Division to correctly identify the test in determining whether to proceed by way of summary dismissal. If the General Division either failed to identify the test or misstated the test altogether, this would qualify as an error of law which, under the correctness standard, would require me to conduct my own analysis and substitute my own view as to the correct outcome.

[26] Under section 53 of the DESDA, the General Division is required to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[27] At paragraph 4 of its decision, the General Division correctly cited subsection 53(1) of the DESDA and section 22 of the *Regulations*, that it must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success, but before doing so, must give notice in writing to an appellant and allow the appellant a reasonable amount of time to make submissions.

[28] There is no dispute that the General Division gave the appropriate notice to the Appellant under subsection 22(1) of the *Regulations*, but apart from citing the provision, did the General Division properly apply subsection 53(1) of the DESDA in summarily dismissing the appeal?

[29] Neither the DESDA nor the *Regulations* defines a "reasonable chance of success", although the Federal Court of Canada in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 held that, in the context of assessing applications for leave to appeal, a reasonable chance of success is akin to there being an arguable case at law. This has been consistently held to be a fairly low threshold to meet.

[30] Summary dismissals have evolved as they are intended to be an efficient and cost-savings way to dispose of claims or appeals. Various jurisdictions provide for summary dismissals (or summary judgments), with each having enacted differing statutory requirements.

[31] Subsection 215(1) of the *Federal Courts Rules* states that the Federal Court of Appeal or Federal Court (as the circumstances require) shall grant summary judgment if it is satisfied that there is no genuine issue for trial with respect to a claim or defence. If the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant summary judgment accordingly. If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or defence, the Court may determine that issue by way of summary trial or dismiss the motion in whole or in part and order that the action, or the issues not disposed of by summary judgment, proceed to trial.

[32] The *Civil Rules of Procedure* in Ontario and the *Court of Queen's Bench Rules* of Manitoba are similar to the *Federal Courts Rules*. Section 20.04 (2) of the Ontario *Rules* states:

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

[33] In British Columbia, under Rule 9-6(5)(a) of the B.C. *Supreme Court Rules*, if the court is satisfied that there is no genuine issue for trial, is required to pronounce judgment or dismiss the claim.

[34] The *Alberta Rules of Court* provide for summary judgment in respect of all or part of a claim on one or more of the following grounds:

> (a) There is no defence to a claim or part of it;
>
> (b) There is no merit to a claim or part of it;
>
> (c) The only real issue is the amount to be awarded.

[35] Under section 13.04 of the *Nova Scotia Civil Procedure Rules*¸ a judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

[36] And, under the *Supreme Court of Prince Edward Island Annotated Rules of Civil Procedure*, the Court there shall grant summary judgment if it is satisfied there is no genuine issue requiring a trial with respect to a claim or defence.

[37] It seems clear from the respective differing statutory schemes that a summary dismissal or judgment is contemplated where there is no genuine issue, basis, or any merit to a claim (or

defence) to justify proceeding further with a trial or hearing. The language under subsection 53(1) of the DESDA is markedly different in that it refers to "no reasonable chance of success", rather than suggesting "no genuine issue" or "no merit", but a determination as to the appropriateness of a summary dismissal would seem to justify similar consideration.

[38] In *M.C. v. Canada Employment Commission,* 2015 SSTAD 237, my colleague M. Borer held in an employment insurance appeal that in determining whether to summarily dismiss a claim, it is not appropriate to examine the case on the merits in the absence of the parties and then to dismiss the case on the basis that it cannot proceed. In citing *Lessard-Gauvin v. Canada (Attorney General),* 2013 FCA 147 and *Breslaw v. Canada (Attorney General),*2004 FCA 264, my colleague concluded that the test to be applied in cases of summary dismissals is whether it is "plain and obvious on the face of the record that the appeal is bound to fail". He states that the true question is whether the failing of an appeal is pre-ordained, irrespective of what evidence or arguments might be presented at a hearing.

[39] My colleague set out the test for summary dismissals as being whether it is plain and obvious on the face of the record that the appeal is bound to fail. There are some circumstances whereby it might be plain and obvious that a summary dismissal is the appropriate disposition, but there are some cases in which further investigation will be required to determine whether an appeal has a reasonable chance of success.

[40] For instance, if a claimant made a claim for a disability pension under the *Canada Pension Plan,* but had no contributions whatsoever to the Canada Pension Plan, then it would be plain and obvious that the matter was appropriate for a summary dismissal. However, if a claimant made contributions to the Canada Pension Plan, it might not be plain and obvious that a summary dismissal is appropriate, without assessing those contributions. It is only after having reviewed the contributions to the Canada Pension Plan that one would be able to determine whether they were insufficient. Under subsection 53(1) of the DESDA, ultimately there would be no reasonable chance of success in an appeal involving a claim for a disability pension, if it was determined that those contributions to the Canada Pension Plan were insufficient. This does not involve assessing the merits of the claim for a disability pension, in the sense of assessing whether the claimant's disability could be found severe and prolonged.

[41] Although the DESDA does not use the same language found in other jurisdictions, the approach or the test is similar. In assessing whether there is a reasonable chance of success, one must look to see whether there is any merit to the appeal. One cannot necessarily know that the appeal has no reasonable chance of success, i.e. is certain to fail, without looking to see if there is an adequate or factual foundation to support the appeal.

[42] Based on its assessment of the facts, the General Division found that the Appellant could not overcome the statutory provisions set out in the *Canada Pension Plan.* The General Division was unable to find an adequate or factual foundation to support the appeal. The General Division found that there was no merit to the appeal and that it was certain to fail. As such, it found that the appeal had no reasonable chance of success. Once it found that there was no reasonable chance of success, the General Division properly determined that a summary dismissal was the appropriate disposition of the appeal. It cannot be said that the General Division erred in setting out the test for a summary dismissal.

ISSUE 3: DID THE GENERAL DIVISION REASONABLY APPLY THE LAW TO THE FACTS?

[43] As noted above, the first step required the General Division to correctly identify the test in determining whether to proceed by way of summary dismissal. Having correctly identified the test, the second step required the General Division to apply the law to the facts. If the correct law is applied, the decision to summarily dismiss must be reasonable. This requires an assessment on a reasonableness standard, as it involves a question of mixed fact and law. However, one does not undergo an assessment of the reasonableness of the decision, if the correct law was not applied.

[44] Turning to the appeal before me, the Appellant sought a division of unadjusted pensionable earnings. In reviewing the law, the General Division concluded that after a divorce judgment has been granted and after a party applies for a division, that a division is then made. The division is made, subject to any exceptions under the *Canada Pension Plan*, such as a written agreement entered into between the parties in which they mention the *Canada Pension Plan* and opt out of the division, and that provision of the agreement is expressly permitted in the province which governs the agreement and the provision in the written

agreement has not been invalidated by a court order. The General Division's restatement of the law as it pertains to divisions of unadjusted pensionable earnings was correct.

[45] Here, the facts were that the Appellant divorced in November 1991. In July 2012, the Appellant applied for a division of unadjusted pensionable earnings by filing the form *Canada Pension Plan Credit Split*. However, the Appellant and her former spouse had entered into a (separation) agreement on November 27, 1990 in which they expressly opted out of the division of unadjusted pensionable earnings under the *Canada Pension Plan*. The agreement, at pages GT1-36 to GT1-45 reads in part:

> **DIVISION OF ASSETS**
>
> . . .
>
> 3. Without limiting the generality of the foregoing paragraph, the Husband and Wife acknowledge that they are aware of their rights under the legislation and regulations governing the Canada Pension Plan to apply to the Department of National Health and Welfare of their designates, to have the other party s credits under the Canada Pension Plan distributed equally between the party and themselves. The Husband and Wife covenant and agree each with the other that in the event that at some time in the future they become eligible to apply to the Department of National Health and Welfare of their designates, for distribution of the other party s credits under the Canada Pension Plan, either as a result of a dissolution of their marriage or amendments or modifications in the legislation and regulations governing the Canada Pension Plan, then the parties hereto covenant and agree each with the other, that **they shall not make any such application to have the other party s credits under the Canada Pension Plan or any other such plan which might replace the Canada Pension Plan, distributed between the other party or themselves** . . . (My emphasis)

[46] This agreement was made and subject to the laws of British Columbia, which permits such agreements. No court had subsequently invalidated that opt-out provision in the agreement. The relationship between the two parties during the course of their marriage, the emotional toll it exacted on the Appellant, as well as the Appellant's current impecunious state, are irrelevant considerations as to whether the Appellant can now resile from the agreement to opt out of the division of unadjusted pensionable earnings. Based on these set of facts, the General Division was left with no option but to dismiss the Appellant's appeal for a division of unadjusted pensionable earnings. Given that there was no basis for a division of unadjusted pensionable earnings to occur, i.e. there were no triable issues or any merit to the claim, the

General Division rightly concluded that the matter could be disposed of by way of a summary dismissal.

[47] Counsel submits that the decision of the General Division is entirely reasonable as it is transparent, intelligible and is the only acceptable outcome based on the law and the facts. Counsel further submits that as the General Division correctly stated the law and reasonably applied it to the facts, the decision contains no reviewable error to permit the intervention of the Appeal Division. I accept these submissions.

CONCLUSION

[48] The Appeal is dismissed.

Janet Lew
Member, Appeal Division