Citation: *A. P. v. Minister of Employment and Social Development,* 2015 SSTAD 973

Appeal No. AD-15-297

BETWEEN:

A. P.

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] This is an appeal from a decision dated February 27, 2015 of the General Division, summarily dismissing the Appellant's appeal of a division of unadjusted pensionable earnings and the date of separation for the calculation of the credit split. The General Division summarily dismissed the appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal of the summary dismissal decision on May 21, 2015. 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 parties 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 and for a determination of the date of separation?

    a. Did the General Division identify the correct legal test as to when it is appropriate to summarily dismiss a matter?

    b. If the General Division identified and applied the correct legal test, was the General Division's application of the test to the facts by all accounts

reasonable? In other words, given the factual circumstances before it, was it appropriate to summarily dismiss the appeal?

3. If the summary dismissal was inappropriate, can the decision of the General Division still stand?

FACTUAL BACKGROUND

[5] The Appellant and the Interested Party entered into a separation agreement on October 10, 1996 (GT1-29 to GT1-37/GT1-104 to GT1-111). The agreement reads in part as follows:

> 4. LIVING SEPARATE AND APART
>
> The parties have been living separate and apart under the same roof since May 1, 1995, this being the Valuation Date as defined in Part I of the *Family Law Act.* The parties shall continue to live separate and apart from each other for the rest of their lives and there is no reasonable prospect that they will resume cohabitation.

[6] On October 15, 1996, counsel for the Interested Party wrote to the Appellant advising that the divorce between the Appellant and the Interested Party could not take place until April 1, 1997 at the earliest, "since [their] date of separation was April 1, 1996" (GT1-15).

[7] The Interested Party applied for a division of unadjusted pensionable earnings in September 2011. She indicated on the application form that she and her former spouse last resided together in April 1996 (GT1-07).

[8] On May 8, 2012, the Respondent wrote to the Appellant, asking him to confirm that that he and the Interested Party resided together from January 1964 to April 1996 (GT1-12/44/80). In a statement dated June 1, 2012, the Appellant declared that he had been separated from the Interested Party since May 1, 1995 (GT1-11/14). In a letter dated June 12, 2012, in response to the Respondent's letter of May 8, 2012, the Appellant reiterated that he and the Interested Party had lived separate and apart since May 1, 1995. One portion of the letter was redacted (GT1-16). The Appellant submitted a copy of the same letter to the Office of the Commissioner of

Review Tribunals (OCRT). This copy of the letter shows the text which had been redacted; that portion reads “Separated Sept 10, 1997” (GT1-50/86).

[9] On July 6, 2012, the Respondent wrote to the Appellant, advising that any spousal agreement signed on or after June 4, 1986 could not prevent a division of pension credits, unless legislation permitted under governing provincial law allowed the parties to opt out of the division of pension credits. The Respondent indicated that it had documentation on file showing the date of separation as April 1, 1996 (GT1-17/47/83).

[10] The Appellant sought a reconsideration of the decision of the Respondent. On September 5, 2012, the Respondent advised that it had reviewed the separation agreement dated October 10, 1996, which indicated that the parties had been living separate and apart since May 1, 1995 (GT1-19/78). The Respondent explained that when the division of pension credits was processed, the date of April 1, 1996 was used as the date of separation. The Respondent now adjusted the date of separation to May 1, 1995 (GT1- 19).

[11] On October 15, 2012, the Appellant appealed the reconsideration decision to the OCRT (GT1-41/75). The Appellant contested the division of pension credits, on the grounds that the parties had already agreed to a division of all assets, and that this was reflected in the divorce decree. The Appellant also contested the date of separation and submitted that he was basing his appeal on his separation agreement of October 10, 1996 with the Interested Party.

[12] In a letter dated February 10, 2013 addressed to the OCRT, date stamped received on February 22, 2013, the Appellant referred to a declaration made by the Interested Party on May 28, 1996 (*sic)* before the Family Court of Kingston, in which she declared that she had lived separate and apart from the Appellant for at least five years. (The date that reasonably matches the description of this document is actually dated May 23, 1996.) The Appellant submitted that the Respondent should now accept May 28, 1991 as the date of separation between the Appellant and the Interested Party (GT1-68).

[13] Counsel for the Interested Party filed submissions with the Social Security Tribunal on August 1, 2013, in which he submitted that the Appellant had failed to provide any evidence to support his allegations (GT1-114 and GT3-1).

[14] 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.

[15] On January 17, 2014, the Social Security Tribunal received a letter from the Appellant. The Appellant conceded that a division of pension credits was mandatory but he continued to contest the date of separation, relying on the Interested Party's declaration of May 23, 1996 in which she set out that she and the Appellant had been living separate and apart under the same roof for at least five years. The Interested Party also indicated in the declaration that it was only until April 1, 1996 that she decided to end the marriage (GT2-1 to GT2-18).

[16] On December 16, 2014, the General Division gave notice in writing to the Appellant and to counsel for the Interested Party, advising that it was considering summarily dismissing the appeal because:

> The Canada Pension Plan includes mandatory credit splitting for divorces occurring after January 1, 1987. Any spousal agreement signed after June 4, 1986 cannot prevent a division of pension credits.

[17] The General Division invited the Appellant and the Interested Party to provide detailed written submissions by no later than February 16, 2015, if they believed that the appeal should not be summarily dismissed, explaining why the appeal had a reasonable chance of success.

[18] By letter dated January 30, 2015 and received by the Social Security Tribunal on February 12, 2015, the Appellant responded to the notice of intention to summarily dismiss his appeal (GT6). The Appellant advised that he did not dispute the mandatory credit splitting. He confirmed however that he continued to disagree on the date of separation. He submitted that, based on the Interested Party's statement of May 28, 1996 (*sic)*, the date of separation should be no later than April 1991 or thereabouts.

[19] The Appellant stated that he had in past confused the date of separation with when he last resided with his wife (which was in May 1996, when he retired from work), as he had been asked "when did you last live with your wife"? The Appellant pointed to correspondence dated July 6 and September 5, 2012 from the Respondent, which he alleges reads, "we understand that you and [the Interested Party] lived together from January 1964 till April 1996". The Respondent's letter of May 8, 2012 reads, "We understand that you and [the Interested Party] lived together from January 1964 to April 1996" (GT1-12), but, in fact, neither the letter dated July 6, 2012 (GT1-17) or September 5, 2012 (GT1-19) used this language that the parties lived together. In its letter of July 6, 2012, the Respondent wrote:

> In your reply to our letter dated May 8, 2012, you indicated that your date of separation from [the Interested Party] was May 1, 1995. We have documentation on file showing your date of separation as April 1, 1996 and have accepted that date. It was also indicated in your letter that you and [the Interested Party] have a Separation Agreement dated October 10, 1996.

[20] In its letter of September 5, 2012, the Respondent wrote, "We have reviewed the Separation Agreement dated October 10, 1996 which indicates the parties have been living separate and apart under the same roof since May 1, 1995".

[21] In his submissions of January 30, 2015, the Appellant also argued that

> The "Spousal Agreement" although an enforceable valid Legal document, I believe, does not come within your bailiwick or purview and has to be argued before a different forum.

[22] On February 27, 2015, the General Division rendered its decision. The General Division relied upon and referred to the following provisions and facts, in coming to its decision:

i. 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;

ii. The best evidence of the date of separation was contained in the separation agreement dated October 10, 1996. The parties acknowledged the date of separation as having been May 1, 1995. The General Division found that there was

nothing to independently corroborate an alternative separation date and that in any event, it would not override the separation agreement;

iii. The separation agreement entered into between the spouses did not contain any specific reference to the *Canada Pension Plan* and did not indicate any intention of the spouses that there be no division or splitting of pension credits under the Canada Pension Plan;

iv. Even had there been such a provision in the separation agreement, Ontario does not permit parties to opt out of a division of unadjusted pensionable earnings; and

v. The General Division does not have any jurisdiction or authority to relieve the Appellant from a division of unadjusted pensionable earnings.

[23] On May 21, 2015, the Appellant filed an appeal from the decision of the General Division. On July 6, 2015, counsel for the Interested Party filed submissions, and on July 10, 2015, counsel for the Respondent filed submissions.

SUBMISSIONS

[24] The Appellant submits that the decision of the General Division "is rife with prevarications". The Appellant submits that the General Division based its decision on an erroneous finding of fact without regard for the material before it, namely, that it erred when it determined the date of separation between the Appellant and Interested Party as being May 1, 1995. The Appellant submits that the parties separated by no later than April 1, 1991 (AD1-30). The Appellant relied on the Interested Party's declaration of May 23, 1996 that they had been living separate and apart under the same roof for at least five years (GT2-18). The Appellant further submits that although a separation agreement entered into between the parties provided a clear date of separation, the General Division was not bound by the separation agreement or by the date of separation set out therein, as it could look to the actual factual circumstances between the parties. Otherwise, the Appellant does not dispute that a division of unadjusted pensionable earnings was mandatory.

[25] 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. Counsel for the interested party filed written

submissions on July 6, 2015, while counsel for the Respondent filed written submissions on July 10, 2015.

[26] Counsel for the Interested Party submits that the appeal be dismissed, as the Appellant's appeal "recites the same evidence, which is (*sic)* already been rejected, and raises no grounds of legal error or procedural unfairness".

[27] 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 credit splitting, in light of a separation agreement in the Province of Ontario.

[28] Counsel for the Respondent submits that the General Division did not err in its application of the law to the facts. Counsel submits that the *Canada Pension Plan* does not permit parties to opt out of the division of pension credits unless the province in which the parties reside specifically allows them to agree not to apply to split pension credits. Counsel notes that the Appellant and his former spouse resided in Ontario, a province that does not allow parties to opt out of divisions of unadjusted pensionable earnings. Counsel submits that the General Division correctly stated that it did not have the jurisdiction to deny the Interested Party's application for a division of pension credits.

[29] As for the issue about the date of separation for the calculation of the division of pension credits, counsel for the Respondent submits that as the General Division is the trier of fact, it has the authority to assign weight to the evidence before it. Counsel submits the General Division properly identified the date of separation of May 1, 1995, which was agreed to between the two parties in their separation agreement. Counsel submits that the date of separation is not contested. Counsel submits that the finding by the General Division that separation agreement represented the best evidence available for determining the date of separation for the calculation of the division of pension credits is entirely reasonable. Counsel submits that the decision of the General Division is transparent, intelligible and is the only acceptable outcome based on the law and the facts.

[30] 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

[31] 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;
>
> (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.

[32] 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.

[33] 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.

[34] 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.

[35] 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.

[36] 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.

[37] Thus, the applicable standard of review will depend upon the nature of the alleged errors involved.

ISSUE 2 – DID THE GENERAL DIVISION ERR IN SUMMARILY DISMISSING THE APPELLANT'S APPEAL?

[38] Counsel for the Respondent submits that if the General Division erred in its statement of the test for a summary dismissal or to its statement of the law with respect 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.

[39] Counsel for the Respondent submits that the main issue in this appeal 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.

i. Did the General Division correctly state the test for a summary dismissal?

[40] Counsel for the Respondent submits that the first step required the General Division to correctly identify the law with respect to summary dismissals under section 53 of the DESDA.

[41] Subsection 53(1) of the DESDA requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. 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: *Dunsmuir* and *Housen v. Nikolaisen*, [2002] S.C.R. 235, 2002 SCC 33 (CanLII) at para. 8.

[42] The General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraph 6 of its decision.

ii. Did the General Division correctly state the law with respect to whether a division of unadjusted pensionable earnings is applicable?

[43] Prior to the hearing before the General Division, the Appellant conceded that a division of unadjusted pensionable earnings was mandatory. The General Division therefore was not required to determine the law with respect to whether a division of unadjusted pensionable earnings was applicable. I consider the issue as to whether the appeal (on the matter of the division of pension credits) was properly summarily dismissed to be moot.

iii. Given the factual circumstances before it, was it appropriate for the General Division to have summarily dismissed the appeal?

[44] 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. It is insufficient to simply recite the test for a summary dismissal set out in subsection 53(1) of the DESDA, without properly applying it. Having correctly identified the test, the second step required the General Division to apply the law, or in this case, the test 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.

[45] In the appeal before me, the Appellant conceded prior to the appeal before the General Division having commenced that there was no issue as to whether a division of unadjusted pensionable earnings was mandatory between the Appellant and the Interested Party. The Appellant maintains that position. The only issue which the Appellant continues to contest is the date of separation with the Interested Party. The sole question before me therefore is whether it was appropriate for the General Division to have summarily dismissed the appeal on the issue of the date of separation.

[46] Counsel for the Respondent submits that a summary dismissal was the appropriate disposition on the issue of the date of separation, as the date of separation was not contested (at paragraphs 4 and 32 of his submissions). I cannot accede to this submission, as the date of

separation has been a contentious issue from the outset. There have been no fewer than five possible dates of separation which have been offered between the Appellant and the Interested Party at various times: no later than April 1991; May 28, 1991; May 1, 1995; April 1, 1996; and September 10, 1997. Some of these dates are much less credible than others, but there is a documentary trail for these dates, some more limited than others.

[47] Did the General Division properly apply subsection 53(1) of the DESDA in summarily dismissing the appeal? Neither the DESDA nor the Regulations defines a "reasonable chance of success", although the Federal Court of Appeal 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. In the context of summary dismissals, the language is that there is no reasonable chance of success. Or, put another way, "no reasonable chance of success" is a considerably higher threshold than had the test merely been "a reasonable chance of success", for a summary dismissal.

[48] In my view, the test as to whether the appeal has no reasonable chance of success requires one to determine whether the appeal is certain to fail. This necessarily involves some assessment as to whether there is any merit to the appeal. This is consistent with how the federal and provincial rules of court or rules of procedure dealing with summary dismissals have been applied, although the language used in each of the various jurisdictions differs. Rather than using "no reasonable chance of success", the federal and provincial rules use "no genuine issue" or "no merit". Either way, one cannot know that an appeal has no reasonable chance of success or that it is plain and obvious that it is certain to fail, without determining whether there is an adequate or factual foundation which might support an appeal. This by no means however suggests that an assessment on the merits is appropriate.

[49] This approach is analogous to the exercise undertaken by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.,* [2011] 3 SCR 45, 2011 SCC 42 (CanLII). One of the issues before the Court was determining the test for striking out claims for failure to disclose a reasonable cause of action, under what was then Rule 19(24) of the *B.C. Supreme Court Rules.* The Court stated that another way of putting the test is that the claim has no reasonable prospect

of success. That language is not dissimilar from that set out in subsection 53(1) of the DESDA. The parties in *Imperial Tobacco* agreed on the test but not on how it should be applied and the Court therefore proceeded to review the purpose of the test and its application, as that would provide some guidance as to how the test should be applied.

[50] Ultimately, the Court in *Imperial Tobacco* held that the question to pose is "whether, considered in the *context of the law and the litigation process*, the claim has no reasonable chance of succeeding." The Court also referred to *Operation Dismantle Inc. v. the Queen,* 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 455, where the Court held that a motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are "manifestly incapable of being proven".

[51] In *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.*, 1984 CanLII 775 (BCCA), Lambert J.A. referred to *Progressive Const. Ltd. v. Newton*, 1980 CanLII 493 (BCSC), 25 B.C.L.R. 330, [1981] 2 W.W.R. 741, 117 D.L.R. (3d) 591 (S.C.), where he said that Esson J. accurately summarized the law in relation to establishing a defence on an application for summary judgment, as follows, at pp. 334 to 335:

> The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

[52] Lambert J.A. then went on to say that, "In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed."

[53] In *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149, there was a cross-appeal by the respondent to have the statement of claim struck in its entirety and that summary judgment be granted to it. The Court of Appeal stated that it was "inconceivable … that a defendant could obtain summary judgment without presenting sworn evidence establishing that the claim [was] without merit". Low, J.A.

concluded that, in his opinion, the chambers judge was obliged to dismiss the application for summary judgment because of the absence of sworn evidence establishing that the claim was without merit. Again, the focus was on whether there was any merit to the claim.

[54] In *Old Oak Properties Inc. v. Roblaw Services Ltd.,* 1997 CanLII 1897 (ON CA), the Ontario Court of Appeal set aside an order summarily dismissing the appellant's claim, as it found that it was "not at all clear that the appellant's claim would not succeed". The Court of Appeal also found that the facts there gave rise to several triable issues, including the terms of the tenancy agreement, the landlord's right to terminate the tenancy and whether there was surrender by operation of law.

[55] As stated by the Court of Appeal of Alberta in *Heikkila v. Apex Land Corporation*, 2007 ABCA 92, "nothing is gained by permitting hopeless litigation to proceed" (though in that case the matter was summarily dismissed on the basis that it was barred by statute).

[56] It is apparent from this line of authorities that when determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. This requires one to distinguish an "utterly hopeless" from a "weak" case. In the latter case, the evidence in support of a position might be flimsy, but there is at least some factual or evidentiary support for it, whereas in an "utterly hopeless" case, there is no or an inadequate factual foundation to support that position, and the outcome is "manifestly clear". The weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining, i.e. analyzing and assigning weight, to that evidence. That is in essence what occurred here, when the General Division proceeded to assess the merits as to when the separation between the parties occurred.

[57] Having found that it preferred the separation agreement as representing the best evidence of the date of separation, over other arguable dates, it seems that the General Division concluded that the matter was appropriate for a summary dismissal. However, the fact that the General Division was required to assess and weigh the evidence indicated that there were triable issues. While the General Division was entitled to make findings of fact as to whether the separation agreement could be superseded and what represented the best evidence as to the

date of separation, this went well beyond applying the test for a summary dismissal. It would have been a different matter altogether if the parties had unanimously agreed that the date of separation was May 1, 1995 and there was no other evidence or suggestion that there could have been an alternative date of separation. If the General Division had to analyze the evidence, assign weight and decide upon competing dates of separation, it cannot be said that there was no reasonable chance of success, no triable issue, or no merit to the appeal. While the General Division correctly recited the test for a summary dismissal, that does not signal that the correct law was *de facto* applied. It is irrelevant in assessing whether the matter was appropriate for a summary disposition as to whether overall the decision itself could be considered reasonable, as the overriding consideration in this second step must be whether the correct test was applied.

[58] Here, the General Division muddied the distinction between a manifestly clear, "utterly hopeless" case without merit and in this case, a probable very weak case, and thereby improperly characterized the dismissal of the appeal as a summary dismissal. The General Division ought not to have summarily dismissed the appeal on the issue of the date of separation.

ISSUE 3: IF THE APPEAL BEFORE THE GENERAL DIVISION OUGHT NOT TO HAVE BEEN SUMMARILY DISMISSED, CAN THE DECISION OF THE GENERAL DIVISION STILL STAND?

[59] The General Division improperly characterized the disposition of this matter as a summary disposal, but in fact it assessed the appeal on its merits based on the documents and submissions, which it was permitted to do under section 28 of the *Regulations.* That section permits the General Division to make a decision on the basis of the documents and submissions filed.

[60] The General Division's determination as to the date of separation involved an assessment of the facts. While the Appellant raises issues as to the enforceability of a separation agreement, the General Division did not address that type of legal question and concerned itself only with the facts regarding the competing dates of separation. Here, there was a clear evidentiary foundation upon which the General Division based its decision.

[61] Even so, and even if the conclusion falls within the range of acceptable outcomes, the decision of the General Division cannot be saved as the Applicant may have been denied any measures available to him under the DESDA or the *Regulations*.

[62] Finally, in *obiter,* I query whether any significance attaches to the words "it is satisfied that" set out in subsection 53(1) of the DESDA. The subsection currently reads that the "General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success". If the words "it is satisfied that" were removed from the subsection, then there would be no question that the appeal must be summarily dismissed if there is no reasonable chance of success, but the inclusion of the words may well diminish the threshold for a summary dismissal. This of course would only be germane on an appeal to the Appeal Division. As I have not received any submissions on this point, I will defer consideration.

CONCLUSION

[1] For the reasons set out above, the Appeal is allowed and the matter referred to the General Division for reconsideration on the issue of the date of separation between the Appellant and the Interested Party.

Janet Lew
Member, Appeal Division