

Citation: *R. E. v. Minister of Employment and Social Development*, 2015 SSTAD 1123

Date: September 22, 2015

File number: AD-15-377

APPEAL DIVISION

Between:

R. E.

Appellant

and

**Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)**

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on September 22, 2015

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] This is an appeal from a summary dismissal of an appeal of a reconsideration decision.

[3] The Appellant applied for a division of unadjusted pensionable earnings (DUPE), between him and his wife L. E. He was partially successful. The Respondent denied his request for the years 1991 to 2010 as the Appellant was receiving disability benefits during this period. The Appellant asked the Respondent to reconsider its decision to exclude these years from the division; which it did. However, the Respondent did not change its decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal (the Tribunal).

[4] On March 24, 2015, a Member of the General Division of the Tribunal issued a decision dismissing the Appellant's appeal summarily. The Member held that paragraph 55.2(8)(d) of the Canada Pension Plan (CPP), applied to the facts of the case. Further, the Member determined that this was an appropriate case in which to apply the summary dismissal provisions of the *Department of Employment and Social Development (DESD) Act*.

[5] The Appellant appealed to the Appeal Division.

GROUND OF THE APPEAL

[6] The Appellant advanced subsection 58(1)(c) of the DESD Act as the ground of the appeal. He stated that 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.

[7] He claimed that the General Division made erroneous findings of fact because it failed to accept that he was contributing to the CPP during the excluded period, as well as from its refusal to accept that the credit split that was done in 2013 was based on a period that commenced in 1985 and which included the disputed years.

[8] The Appellant made the following submissions:

1. Evidence submitted to the General Division shows that R. E. continued contributing to CPP from 1991 to present. The letters dated October 12-2007 and May 23-2008 present the amount of R. E.'s weekly contribution to CPP as of January 1, 2007. As evident from these two letters, R. E. contributed \$38.27 on a weekly basis as of January 1, 2007 for that year. Two further letters dated December 27, 2013 and December 29, 2014 further illustrate the weekly contribution to CPP for the subsequent years. The amount contributed weekly as per these letters has been used since 1991.

2. The General Division ignored submitted evidence proving L. E. was in dispute with WSIB of Ontario during 1985. The evidence illustrating L. E.'s receipt of WSIB of Ontario can be found in the October 18, 1985 letter from McKaig & McKaig Barristers & Solicitors. This dispute resolved with L. E. receiving a WSIB of Ontario pension from 1985 to present. Attached to this appeal is L. E.'s 2010 T5 from WSIB of Ontario. Since L. E. received a WSIB of Ontario pension from 1985 to present, she holds no entitlement to R. E.'s pension pursuant to the CPP section 55.1. However, under the calculations of CPP for the pension split made in 2013, 1985 onward were included in the calculation of the pension split.

ISSUE

[9] The Tribunal frames the issue in the following manner:

Did the General Division base 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?

THE LAW

[10] A number of statutory provisions apply to this appeal. They include section 55 of the CPP, section 58 of the DESD Act as well as subsection 53(1) of the DESD Act. Section 58 of the DESD Act sets out the grounds of appeal. Under this provision there are only three grounds on which an appellant may bring an appeal, namely,

- (1) a breach of natural justice has occurred;
- (2) the General Division erred in law; and
- (3) the General Division based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.¹

¹ **58(1) Grounds of Appeal –**

- 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.

[11] Subsection 53(1) of the DESD Act gives the General Division express jurisdiction to dismiss an appeal where the General Division is satisfied that the appeal has no reasonable chance of success.² In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 as well as in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. The Oxford English Dictionary defines the word arguable as “able to be argued or asserted.”³ Where the General Division has exercised its summary dismissal jurisdiction, an affected appellant does not require leave to appeal, he or she can launch the appeal directly. Nonetheless, the grounds of appeal remain the same and are as set out above.⁴

[12] The CPP allows for DUPE, or as it is referred to in this decision, splitting pension credits between former spouses upon the dissolution of their marriage. (*CPP, Section 55*) At the same time the CPP imposes a number of conditions or restrictions with respect to the division. Subsection 55(6) sets out the circumstances in which there will be no division of pension credits. “Receiving a disability pension” is expressly set out as one situation that would result in there being no division of pension credits. The subsection provides,

(6) No division – No division of unadjusted pensionable earnings for a period of cohabitation shall be made

(d) for any month that is excluded from the contributory period of one of the former spouses under this Act or a provincial pension plan by reason of disability (R.S.C. 1985, c. 30 (2nd. Supp.), s. 22(3); 2000, c. 12, s. 46 (3)).

[13] The Appellant has admitted that since the early 1980s to the present (2015) he has been receiving not one but two disability pensions. However, he contended that for several years during the same period he worked and contributed to the CPP. In his submission, he ought not to be caught by the disability exclusion.

² The General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

³ Oxford University Press 2015.

⁴ 56 *Leave* – (1) an appeal to the Appeal Division may only be brought if leave to appeal is granted.

(2) *Exception* - Despite subsection (1) no leave is necessary in the case of an appeal brought under subsection 53(3) [summary dismissal by the General Division].

ANALYSIS

[14] On appeal to the Appeal Division, an appellant must show, on a balance of probabilities, that the General Division decision breached one of the grounds of appeal set out at subsection 58(1) of the DESD Act. The task of the Appeal Division is to determine whether the Appellant has met his or her onus. In the instant case, the Appellant has submitted that the General Division breached the third ground of appeal. For the reasons set out below, the Tribunal finds that he has not met his onus.

STANDARD OF REVIEW

[15] In assessing whether, as submitted by the Appellant, the decision of the General Division the General Division based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it, the Tribunal must first determine the appropriate standard of review to be applied to the General Division decision. To date, neither the Federal Court nor the Federal Court of Appeal has articulated what is the appropriate standard of review that the Appeal Division should apply to decisions of the General Division. The Appellant made no submissions in this regard; however, the Respondent submitted that “reasonableness” is the appropriate standard by which the Tribunal should review the General Division decision.

[16] In *Dunsmuir*,⁵ the Supreme Court of Canada (the SCC), enumerated two standards of review: “reasonableness” and “correctness.” In discussing the “reasonableness” standard, Bastarache and LeBel JJ. wrote what has become the accepted definition of the reasonableness standard, stating at paragraph 47,

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. 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

⁵ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9.

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.

[17] Regarding the correctness standard of review, the Justices stated,

[50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[18] In determining the appropriate standard of review to apply, the Tribunal adopts the approach set out in *Dunsmuir* namely, that, "where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated."

[19] The question before the General Division required several factual determinations. The General Division had first to determine whether any of the former spouses had received a disability pension and, if so, who and when. Consequent upon these initial, factual determinations, the General Division had to apply the law regarding "division" or "no division" as the case may be.

[20] In the Appellant's case the General Division's factual determination was made easy because the Appellant admitted receiving not one but two disability pensions. He repeated this admission in his Appeal submissions. Referring to documents he enclosed as submissions on appeal, the Appellant stated,

I have been in receipt of these two disability pensions since the early 1980s to present. I also worked, contributed to the CPP and collected WSIB disability pensions prior to my 1987 accident. This once again demonstrates that paragraph 55.2(8)(d) of the CPP is irrelevant to this case of pension splitting. (AD2-4)

[21] The General Division was also required to apply the law in respect of summary dismissals. The Tribunal finds that the legal question of whether the Appellant is excluded from division is intertwined with the factual question of whether he received a disability pension either

under the CPP or a provincial plan. Similarly, the legal question of whether the appeal should be summarily dismissed is also intertwined with the factual question that underpins the Applicant's eligibility for a division of pension credits as well as the legal question regarding DUPE. Given the statement in *Dunsmuir* regarding the approach to be taken where the legal and factual issues are intertwined and cannot be readily separated the Tribunal finds that reasonableness is the appropriate standard of review of this General Division decision.

Was the General Division decision reasonable?

[22] The Tribunal must decide whether the General Division decision is reasonable in the sense that the decision-making process exhibits the existence of justification, transparency and intelligibility. Further, the Tribunal must decide whether the General Division decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] The Respondent urges upon the Tribunal the view that the General Division decision to summarily dismiss the appeal is reasonable. Counsel for the Respondent submitted that the decision contained no reviewable error; that the General Division accurately referred to the law and reasonably applied the law to the facts. (AD3-9, AD3-10)

The General Division decision contains justification and is transparent and intelligible.

[24] The Tribunal finds that the General Division decision meets the criteria of justification, transparency and intelligibility for the following reasons. First, with respect to the application for a DUPE, the General Division correctly stated the applicable law in regard to when there can be no division of pension credits. Secondly, the facts that gave rise to the General Division decision are clear. There is no dispute that the Appellant was in receipt of a disability pension during the disputed years. Thirdly, when the applicable law was applied to the facts of the case, there was but one predictable outcome, which was that the Appellant is excluded from a DUPE. The Tribunal is of the view that in circumstances such as these, where the pertinent facts are not in dispute; the applicable law is clear; and where on the undisputed facts and law only one, clear decision can be made and that decision is not in an appellant's favour; then no arguable case can be made out.

[25] The Tribunal comes to the same conclusion with respect to the General Division decision to summarily dismiss the appeal. Not only did the General Division correctly state the law on summary dismissal; the fact that the Appellant, as stated earlier, did not have an arguable case, in that by virtue of his receipt of a disability pension during the excluded period he fell squarely within the perimeters of CPP subsection 55(6)(d). The summary dismissal provisions of the DESD Act demand that the General division dismiss an appeal where it is satisfied that the appeal has no reasonable chance of success. This is the case here. Thus, the General Division did not commit a reviewable error by invoking and applying the DESD Act subsection 53(1). The decision to dismiss the appeal summarily contains justification, is transparent and is intelligible. Further, it falls well within the range of possible, acceptable outcomes that are defensible in respect of the facts and the applicable law.

CONCLUSION

[26] For the reasons set out above the Tribunal finds that the General Division did not base its decision on an erroneous finding of fact which it made in a perverse or capricious manner or without regard for the material before it.

[27] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division