Citation: *E. L. v. Minister of Employment and Social Development*, 2015 SSTAD 1180

Appeal No. AD-15-424

BETWEEN:

E. L.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: October 1, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated April 6, 2015 of the General Division, whereby it summarily dismissed his appeal for an unadjusted Canada Pension Plan retirement pension, on the basis that he had applied for the pension before he was 65 years of age. The General Division summarily dismissed his appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal on July 2, 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. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[3] 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?

3. Did the General Division fail to consider submissions made by the Appellant on March 30, 2015, and if so, what effect would this have had on the outcome?

FACTUAL OVERVIEW

[4] The Appellant was born in June 1950. He applied for a Canada Pension Plan retirement pension in August 2011, when he was 61 years and four months of age, or 45 months before he reached age 65. The Respondent allowed the application for a retirement

pension, and reduced the pension by 0.5% for each month he was under the age of 65. This resulted in a downward adjustment of his monthly retirement pension of 22.5%. The Appellant sought a reconsideration of the decision to reduce the retirement pension. The Respondent denied the reconsideration request. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals.

[5] 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 Office of the Commissioner of Review Tribunals transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal.

[6] On February 25, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> *You have indicated in your Notice of Appeal that you question the reason for reducing your pension due to early retirement. You stated that you believe you should be paid $426.75 monthly. Instead you are being paid 335.23 monthly. You disagree with this decision.*
>
> *Paragraph 46(3) of the Canada Pension Plan (CPP) sets out, in part, that when a retirement pension becomes payable commencing with a month other than the month in which the contributor reaches 65 years of age the basic amount of the pension is adjusted by a factor fixed by the Minister.*
>
> *The adjusted amount fixed by the Minister is .5% for each month before the age of 65.*
>
> *In your case, you applied for a CPP retirement pension in August 2011 at age 61. As a result your retirement pension has been reduced by 22.5%. This percentage accords with the number of months prior to your 65th birthday by when you applied for a CPP retirement pension.*
>
> *As a result the reduction applied by the Minister appears to comply with the mandatory provisions of the CPP.*

[7] The General Division invited the Appellant to provide detailed written submissions by no later than March 31, 2015, explaining why his appeal had a reasonable chance of success.

[8] The Appellant filed submissions on March 30, 2015. He submitted that there was incongruity between the calculation of a Canada Pension Plan retirement pension by the Respondent under the Canada Pension Plan and the Canada Pension Plan website calculator. The Appellant submitted that the website does not contain any provisions for penalty for those applying for a Canada Pension Plan retirement pension before age 65. In other words, he was unaware that applying for a Canada Pension Plan retirement pension before age 65 would result in a downward adjustment of the monthly retirement pension. He submitted that this amounts to a penalty and that he should not be penalized for having relied upon the information contained on the website. He considered himself a victim of "fraudulent advertisement", as his decision to seek an early retirement pension was based on his understanding that he would be receiving an unadjusted retirement pension. These submissions were similar to those made by the Appellant in his letter dated April 27, 2012 to the Office of the Commissioner of Review Tribunals.

[9] In his submissions of March 30, 2015, the Appellant attached a letter dated February 3, 2012 from the Respondent (GT5-5 to GT5-7), a Service Canada estimate of monthly Canada Pension Plan benefits (GT5-8 to GT5-9) and a list of the Appellant's pensionable earnings and contributions, to illustrate that the website made no reference to the fact that an upward or downward adjustment could apply. Copies of these documents were in the hearing file before the General Division.

[10] On April 6, 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; and

iii. Paragraph 46(3) of the *Canada Pension Plan*, which sets out, in part, that when a retirement pension becomes payable commencing with a month other than the month in which the contributor reaches 65 years of age, the basic amount of the pension is adjusted by a factor fixed by the Minister.

[11] The General Division found that the amount fixed by the Minister is 0.5% for each month before the age of 65. The General Division also found that the Appellant had applied for a Canada Pension Plan retirement pension at age 61 - 45 months before he turned age 65. The General Division found that the Respondent had properly calculated the adjustment and that the Appellant was entitled to a reduced monthly pension of 22.5% of the basic monthly amount, as this was the equivalent of 45 months times 0.5%. The General Division found that there was no reasonable chance of success on appeal.

[12] On July 2, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

SUBMISSIONS

[13] In the Notice of Appeal filed on July 2, 2015, the Appellant submitted that the General Division did not consider material which he had filed on March 30, 2015, which essentially says that he unduly relied on information contained on the Respondent's website and that he was "lured into early retirement". The Appellant did not cite any other grounds of appeal.

[14] The Respondent filed written submissions on August 17, 2015. The Respondent submitted that the General Division correctly stated and applied the test as to when it must summarily dismiss an appeal. The Respondent further submitted that the General Division also correctly stated the law as it relates to calculating the amount of the Canada Pension Plan retirement pension. The Respondent submits that the General Division did not err in its application of the law to the facts, which are not in dispute. The Respondent submitted that as the facts and the applicable law were uncontested, the General Division could reach only

one possible conclusion. The Respondent further submitted that the General Division does not have any equitable jurisdiction or discretion to vary the amount of the Canada Pension Plan retirement pension. As there was only one possible conclusion for the General Division to draw, the Respondent submitted that the appeal was therefore "bereft of any chance of success" and was properly summarily dismissed.

ISSUE 1: STANDARD OF REVIEW

[15] The Appellant did not address the issue of the standard of review.

[16] The Respondent provided comprehensive submissions on this issue and also addressed the issue as to the level of deference which might be owed by the Appeal Division to the General Division of the Social Security Tribunal.

[17] The Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. The Respondent submits that for questions of law, the Appeal Division should not show deference to the General Division's decision and should apply a correctness standard. The Respondent submits that the issue in this appeal involves allegations that the General Division failed to observe a principle of natural justice and/or based its decision on an erroneous application of the law to the facts. The Respondent submits that, as such, the Appeal Division should review the General Division's fact finding process for "correctness" and to the extent that the appeal involves questions of mixed fact and law, the Appeal Division should review the General Division's decision on a "reasonableness" standard.

[18] The Respondent further submits that as this is an appeal before the Appeal Division and not an application for judicial review, it is appropriate for the Appeal Division to determine the proper standard of review by conducting what it characterizes as a "modified standard of review analysis". The Respondent submits that this analysis considers the respective roles between the Appeal Division and the General Division, Parliament's intent with respect to the nature of the appeal to the Appeal Division outlined in the DESDA, and the nature of the question at hand. The Respondent submits that once this analysis is undertaken, one can determine the standard of review. Ultimately, the Respondent

determined that, based on this modified standard of review analysis, the Appeal Division should apply a correctness standard to General Division decisions on questions of law, and a reasonableness standard on questions of fact and mixed questions of law and fact.

[19] With respect, the "modified standard of review analysis" proposed by the Respondent seems to largely address the issue as to the nature of the hearing before the Appeal Division. It seems to be well settled within the Appeal Division that the hearings before it be a "circumscribed review" (Canada (Attorney General) v. Merrigan, 2004 FCA 253 at para. 9) and that the hearings should be in the nature of a judicial review. Otherwise, the only applicable portion of the "modified standard of review analysis" in determining the appropriate standard of review is the nature of the questions at issue.

[20] 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, while questions of fact and of mixed fact and law are determined on a reasonableness standard. And, when applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome.

[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] The applicable standard of review will depend upon the nature of the alleged errors involved.

[23] 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.

[24] The Appellant does not dispute any of the factual findings made by the General Division. Rather, he alleges that the General Division failed to consider the information and submissions he filed on March 30, 2015. This amounts to either an error of law or an alleged erroneous finding of fact on the part of the General Division, made without regard for the material before it. For an error of law, a correctness standard applies, and if it qualifies as an erroneous finding of fact, a reasonableness standard applies.

ISSUE 2 – DID THE GENERAL DIVISION ERR IN CHOOSING TO SUMMARILY DISMISS THE APPELLANT'S APPEAL?

[25] Although the Appellant does not appear to question the appropriateness of the summary dismissal procedure, I will address that issue before I assess the decision of the General Division.

[26] The Respondent submits that the first task for the General Division was to identify the law with respect to summary dismissals under section 53 of the DESDA, which it did at paragraph 4 of its decision. The Respondent submits that the decision of the General Division to summarily dismiss the appeal contains no reviewable error to permit the intervention of the Appeal Division. The Respondent submits that the decision is reasonable.

[27] 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.

[28] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 4 and 18 of its decision.

[29] 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 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.

[30] In 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. In A.P. v. Minister of Employment and Social Development and P.P., (August 12, 2015), SSTAD-15-297 (currently unreported), I used the language of "utterly hopeless" and "weak" case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear", then the matter would not be appropriate for a summary dismissal. I determined that a weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it.

[31] The General Division found that it was empowered only to the extent of its governing statute and that it is required to interpret and apply the provisions as set out in the Canada Pension Plan. Ultimately the General Division found that there were no options under the Canada Pension Plan in calculating the amount of the monthly Canada Pension Plan retirement pension.

[32] The General Division considered whether, on the facts before it, the appeal met the high threshold set out under subsection 53(1) of the DESDA. The General Division was unable to find an adequate or factual foundation to support the appeal. As the General Division was satisfied that the appeal was without any merit, it rightly concluded that the appeal had no reasonable chance of success, and properly summarily dismissed it on that basis.

ISSUE 3: DID THE GENERAL DIVISION FAIL TO CONSIDER SUBMISSIONS MADE BY THE APPELLANT ON MARCH 30, 2015, AND IF SO, WHAT EFFECT WOULD THIS HAVE HAD ON THE OUTCOME?

[33] The Appellant submits that the General Division failed to consider his submissions of March 30, 2015 that, as he relied on a Canada Pension Plan website which failed to mention the downward adjustment of the monthly retirement pension upon application before age 65, he is entitled to an unadjusted retirement pension under the Canada Pension Plan.

[34] The fact that there is an appeal as of right of a summary dismissal decision does not call for a reassessment or recalculation of the amount of the monthly retirement pension. An appellant must firstly satisfy me on a balance of probabilities that there is a proper ground of appeal under subsection 58(1) of the DESDA. Here, the Appellant submits that the General Division either erred in law or that it based its decision on an erroneous finding of fact that it made without regard for the material before it, when it failed to consider his submissions of March 30, 2015.

[35] The submissions filed on March 30, 2015 in fact mirrored submissions which the Appellant had made previously. The General Division also summarized the Appellant's submissions at paragraph 8 of its decision, so it cannot be said that it was unaware of them. While the General Division may not have explicitly referred to the CPP website calculator in its analysis, it addressed these submissions when it wrote that it was required to interpret and apply the provisions as set out in the *Canada Pension Plan.* In other words, it could not bypass the provisions of the *Canada Pension Plan,* nor could it grant any relief to the Appellant on account of the shortcomings in the information on the website. The

Appellant's submissions, that the General Division failed to consider his arguments of March 30, 2015, are not borne out and I dismiss the appeal on that basis.

[36] Even had the General Division failed to consider the Appellant's submissions of March 30, 2015, and I were to undertake my own analysis and calculation of the monthly retirement pension, I do not see that the outcome would have been any different. The Canada Pension Plan stipulates that the monthly retirement pension is to be adjusted to reflect the time interval between the month in which the retirement pension commences and the month in which the contributor reaches or would reach 65 years of age (but the time interval is deemed never to exceed five years).

[37] As a footnote, it probably would be helpful if the Canada Pension Plan website mentioned that its estimate of the monthly retirement pension is based on an application made at age 65, and that the amount of the monthly retirement pension could be subject to an upward or downward adjustment factor, depending upon when an application for the retirement pension is made. This could clarify any misconceptions.

[38] What seems to be overlooked here is that had the Appellant made the application for the retirement pension at age 65, he would be receiving an unadjusted pension, but he would not be receiving any monthly pension until then. In the Appellant's case, although there has been a downward adjustment of the monthly retirement pension, he began to receive the retirement pension before age 65. From an actuarial perspective, he is considered to be in the same position where the retirement pension is concerned, as if he had applied for the retirement pension at age 65.

CONCLUSION

[39] The Appeal is dismissed.

Janet Lew
Member, Appeal Division