Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *C. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 86

Tribunal File Number: AD-15-992

BETWEEN:

C. F.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 24, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division rendered on June 8, 2016. After conducting an in-person hearing on June 8, 2015, the General Division determined that the Applicant was not entitled to greater retroactivity of a survivor's pension under the *Canada Pension Plan*, as it found that she was not incapacitated between 2007 (the claimed date of commencement of disability) and January 2012, when she applied for a survivor's pension. The Applicant filed an application requesting leave to appeal on September 8, 2015. Her counsel filed additional submissions on September 17, 2015 and again on November 19, 2015. He raised a number of grounds of appeal. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success on any of the grounds cited by the Applicant?

SUBMISSIONS

(a) Applicant's submissions

[3] Counsel for the Applicant submits that the General Division erred as follows, in:

(a) violating the doctrine of legitimate expectations and by failing to observe a principle of natural justice, in not accepting the Applicant's physician's certificate of incapacity;

(b) failing to observe a principle of natural justice by failing to give notice to the Applicant that it would follow *Attorney General v. Danielson*, 2008 FCA 78. Counsel submits that the General Division also erred in misinterpreting *Danielson* as authority to disregard medical evidence;

(c) following *Danielson*, as it is factually distinguishable from the circumstances of the Applicant's case;

(d) acting beyond its jurisdiction, by rendering its own medical opinion in the place of the Applicant's physician's opinion. Counsel submits that the General Division was unqualified to make any findings about the Applicant's medical condition;

(e) interpreting the incapacity provisions of the *Canada Pension Plan* in a restrictive manner;

(f) applying the incorrect onus of proof. Counsel submits that in concluding that there was insufficient evidence of incapacity, despite the expert opinion before it, the General Division effectively required a higher burden of proof. Counsel submits that the only test that was requested of the Applicant was that she obtain a certificate of incapacity, and having done so, she met the onus of proof;

(g) improperly weighing the evidence. Counsel submits that the General Division placed an inordinate amount of weight on the evidence of the Applicant's activities. Counsel submits that the assignment of weight was misplaced, as the General Division should have placed more weight on the evidence of the medical practitioner, who had access to the Applicant's entire medical history. Counsel submits that the General Division fettered its own discretion by improperly weighing the evidence;

(h) in basing its decision on an erroneous finding of fact that the Applicant had the capacity to form and express the intention to apply for a survivor's pension, despite the medical certificate of incapacity; and

(i) in infringing the Applicant's equality rights under section 15 of the *Canadian Charter of Rights and Freedoms*. Counsel submits that "mothers and their children who survive the suicide of fathers are

disproportional [sic] affected in an adverse manner by overly restrictive legislation limiting their recovery of survivor's benefits".

(b) Respondent's submissions

[4] Counsel for the Respondent filed submissions on November 20, 2015. She submits that any arguments raised under the *Canadian Charter of Rights and Freedoms* should not be entertained for the first time in an appeal before the Appeal Division, if they had not been raised or considered by the General Division.

[5] Counsel further submits that none of the alleged errors raised by the Applicant raise an arguable case and that the Appeal Division therefore ought not to grant leave to appeal.

[6] Counsel further submits in the alternative that if the Appeal Division should grant leave to appeal and the *Charter* arguments are to be considered, the appeal should be returned to the General Division to be considered in the first instance as the trier of fact.

ANALYSIS

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

(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.

[8] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada recently approved this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Declaration of incapacity

[9] Counsel for the Applicant submits that the General Division violated the doctrine of legitimate expectations and that it failed to observe a principle of natural justice, in not accepting the Applicant's physician's Declaration of Incapacity.

[10] The Applicant expected that the General Division would accept the physician's opinion without reservation as there was no contradictory medical evidence, thus she did not call the physician to give evidence at the hearing. Counsel submits that this contravened the rule in *Browne* v. *Dunn* (1983), 6 R. 67 (U.K. H.L), as the General Division should have provided the physician with an opportunity to defend or clarify his expert opinion where his qualifications and credibility were in question. Counsel submits that the Applicant could have brought additional evidence of incapacity.

[11] I do not see that the doctrine of legitimate expectations arises in these circumstances. In *Belo-Alves v. Canada (Attorney General),* 2014 FC 1100, the Federal Court held that the doctrine of legitimate expectations is an aspect of procedural fairness and is limited to the rules of procedural fairness. It does not create substantive rights, such as that being sought by the Applicant. The Court referred to the decision in *Reference re Constitutional Question Act (B.C.)* (1991), 127 N.R. 161 (S.C.C.) at paragraph 56 as follows:

> 56. The doctrine of legitimate expectations was discussed in the reasons of the majority in **Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)**, [1990] 3 S.C.R. 1170, 116 N.R. 46, 69 Man. R. (2d) 134. That judgment cites seven cases dealing with the doctrine, and then goes on:
>
> > The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It afford a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The

> court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation. (At p. 1204 S.C.R.)…

[12] I do not see that there were ever any representations that a completed declaration of incapacity or medical certificate would be accepted as conclusive evidence of incapacity. At most, such a declaration or medical certificate is required by the Respondent, but neither document in any way displaces the legal test for incapacity set out in section 60 of the *Canada Pension Plan.*

[13] I do not find that the rule in *Browne v. Dunn* is applicable. The rule arises in the context of cross-examination and basically provides that an opponent's witness ought to be provided with an opportunity to address any contradictory evidence on cross- examination, if the opposing party intends to rely upon evidence that is inconsistent with what that party wants to lead as evidence. In other words, a witness will not be discredited without having had an opportunity to address the discrediting information. I do not see that those circumstances apply in this case. At no point did the General Division indicate that it was making any adverse findings of credibility against the family physician, nor did it find that he lacked the appropriate medical qualifications to render any opinions. The General Division did not make any findings that there was any conflicting or contradictory evidence. The General Division simply found that there was insufficient evidence of incapacity.

[14] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Notice of case law

[15] Counsel for the Applicant submits that the General Division failed to observe a principle of natural justice by failing to inform the Applicant that it would follow *Canada (Attorney General) v. Danielson*, 2008 FCA 78. Counsel submits that the General Division also erred in misinterpreting *Danielson* as authority to disregard medical evidence.

[16] In *Danielson*, the Federal Court of Appeal held that "the activities of a claimant … may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered". I do not interpret *Danielson* to mean that any medical evidence is to be disregarded. The Federal Court of Appeal looked at *Morrison v. Canada (Minister of Human Resources Development)* (May 4, 1997), CP04182 (PAB), in which the Pension Appeals Board indicated that a determination of whether an applicant was incapacitated could involve consideration of expert medical evidence as well as the relevant activities of the individual concerned. It is clear that the Federal Court of Appeal agreed with the Pension Appeals Board that both medical evidence and the activities of an applicant are relevant. The Federal Court of Appeal held that the omission by the Pension Appeals Board to consider the applicant's relevant activities "resulted in a misapplication of the legal test". Clearly, the General Division was required to consider both the medical evidence and the Applicant's activities. In this case, the General Division did not disregard the medical opinion of the family physician. Rather, it indicated that the medical opinion on its own was insufficient, and that it had to also examine the Applicant's activities.

[17] There is no obligation on a decision–maker to give notice to the parties of the legal authorities which he or she might reference, particularly where those authorities directly address the issues raised in the appeal. Here, the parties were alive to or should have been alive to the issues raised by *Danielson.* The Applicant sought to rely on the incapacity provisions under section 60 of the *Canada Pension.* The "evidence" referred to in subsections 60(8) and 60(9) of the *Canada Pension Plan* does not indicate that it is restricted solely to medical evidence, so it cannot be said that the there was no notice that the activities of the Applicant could potentially have been an issue for consideration by the General Division. This would have been so, particularly when the General Division might have considered any of the medical evidence to be of a "general, varied or equivocal nature and perhaps not fully or adequately supported by medical evidence": *Morrison.* More significantly, the Applicant had been copied with the Respondent's Explanation dated December 4, 2012, in which it referred to *Danielson* (page GT2-7 of the hearing file), so it cannot be said that she did not have notice of *Danielson.*

[18] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) *Danielson*

[19] Counsel for the Applicant submits that the General Division erred in following *Danielson,* when it is factually distinguishable and therefore ought not to apply. Counsel submits that unlike *Danielson,* the family physician had not rendered an opinion on the Applicant's activities.

[20] While there may be some factual differences between *Danielson* and the proceedings before me, it is clear that the Federal Court of Appeal found that the medical evidence alone in that case was insufficient, and that the activities of a claimant could be relevant and ought to be considered. This was the same issue which the General Division faced. The General Division noted that the family physician wrote that the Applicant had difficulties completing the application for a survivor's pension. The General Division did not dismiss the family physician's opinion in this regard, but it found that the medical evidence was not determinative of the Applicant's capacity.

[21] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(d) Jurisdiction

[22] Counsel for the Applicant submits that the General Division acted beyond its jurisdiction, by rendering its own medical opinion in the place of the Applicant's own physician's opinion. Counsel submits also that the General Division is not qualified to render medical opinions.

[23] It is irrelevant whether the General Division Member was qualified to make any findings about the Applicant's medical condition. It is not the role of the General Division to undertake any medical assessments. Rather, its role is to determine whether an applicant meets the requirements under the *Canada Pension Plan*.

[24] In this particular case, the General Division was required to determine whether the Applicant met the requirements under section 60 of the *Canada Pension Plan.* This involved determining whether the Applicant was incapable of forming or expressing an intention to make an application for the survivor's benefit. The jurisprudence is well established that medical opinions are not conclusive, as the General Division can look beyond the medical opinions at the Applicant's relevant actions or activities. I do not see how the General Division could be alleged to have somehow substituted its own medical opinion in the place of the medical opinion of the Applicant's family physician when it examined the Applicant's activities.

[25] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(e) Interpretation of *Canada Pension Plan*

[26] Counsel for the Applicant submits that the General Division erred in failing to give a wide and liberal interpretation to the incapacity provisions of the *Canada Pension Plan,* and instead, erred in giving it an overly restrictive interpretation. Counsel submits that, given the Applicant's personal circumstances involving suicide, medical impediments, intervening automobile accidents and other factors, "compassionate interpretation is the applicable standard". Counsel submits that the General Division ought to have followed the line of authorities in the context of the *Income Tax Act.* The Applicant relies on *Radage v. Canada*, [1996] TCJ No. 730, [1996] 3 CTC 2510.

[27] In *Radage,* the Tax Court of Canada stated that it was "faced with the necessity of putting a sensible, practice and compassionate interpretation on the words that will give effect to the intention of Parliament, which is to give a measure of tax relief to persons with serious disabilities". The appellant sought an income tax credit on behalf of his dependent son, whose ability to perform a basic activity of daily living was markedly restricted. Under the *Income Tax Act,* a basic activity of daily living in relation to an individual was defined, in part, as "perceiving, thinking and remembering". Bowman J.T.C.C. held:

> If the object of Parliament, which is to give disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live, is to be achieved the provision must be given a humane and compassionate construction.

[28] Bowman J.T.C.C. then went on to refer to section 12 of the *Interpretation Act*, which provides that every enactment is deemed remedial and shall be given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[29] There is no doubt that Parliament intended to provide some relief from the maximum retroactivity provisions of section 72 of the *Canada Pension Plan* for those who are incapacitated. However, given the restrictive language under section 60, it is also clear that Parliament did not intend this relief to be widely or extensively available, and that it be limited to those who are "incapable of forming or expressing an intention …" The jurisprudence also indicates that the incapacity provisions are quite restrictive, given that incapacity is so narrowly defined.

[30] Here, the General Division was aware of the Applicant's challenging circumstances. It noted that the she had undergone tragedy, had significant family responsibilities and had to rebuild her life. It noted that the family physician wrote that the Applicant had a great deal of difficulty focusing on matters and that there were various factors which contributed to her inability to complete an application for a survivor's pension. While it appears that the General Division was prepared to accept this evidence, it was mindful that the Applicant was, at the same time, able to make major decisions. For instance, it noted that she was able to dissolve a business and sell a house. It noted that while she had the assistance of a lawyer, accountant and real estate guide, she nonetheless had the ability to make major decisions, and that it was these actions which indicated she was able to form and or express an intention to make an application. There is no discretion afforded under the *Canada Pension Plan* or the DESDA for the General Division to define capacity to the latitude sought by the Applicant.

[31] Counsel further submits that in the tax context, disability tax credit forms have been amended and now allow for an "aggregate approach" where two or more "lesser

restrictions" (i.e. disabilities) can be weighed and potentially found to amount to one major restriction (i.e. disability). Counsel suggests that this approach ought to be followed. Counsel has not directed me to any applicable legal authorities for this proposition, and I do not know of any authorities that supersede the requirements under subsections 60(8) and 60(9) of the *Canada Pension Plan* that the applicant had to have been incapable of forming or expressing an intention to make an application.

[32] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(f) Onus of proof

[33] Counsel for the Applicant submits that the General Division erred in applying the incorrect onus of proof. Counsel submits that in concluding that there was insufficient evidence of incapacity, despite the expert opinion before it, the General Division effectively required a higher burden of proof. Counsel submits that the only test that was requested of the Applicant was that she obtain a certificate of incapacity, and that having done so, she met the onus of proof.

[34] As I have indicated above, a declaration of incapacity is required by the Respondent, but producing such a declaration alone does not meet the legal test for incapacity under subsections 60(8) and 60(9) of the *Canada Pension Plan*, nor discharge the burden of proof on an applicant to prove his or her case.

[35] The General Division did not set out the applicable burden of proof, but the fact that the General Division found that there was insufficient evidence before it is not indicative of a more stringent standard than one on the balance of probabilities. Unless some contextual basis can be shown, it cannot be assumed that by requiring the Applicant to elicit sufficient evidence somehow raised the burden of proof.

[36] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(g) Weight of evidence

[37] Counsel for the Applicant submits that the General Division erred in its assignment of weight. The Federal Court of Appeal has previously addressed this submission in other cases, that the Pension Appeals Board had not assigned the appropriate amount of weight to the evidence. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the applicant's counsel identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. The Federal Court of Appeal refused to interfere with the decision-maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact". Although *Simpson* was in the context of a judicial review, I agree with that approach, as the General Division, as the trier of fact, much like the Pension Appeals Board which heard appeals on a *de novo* basis, is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. Unlike its predecessor the Pension Appeals Board, the Appeal Division does not hear appeals on a *de novo* basis, and the grounds of appeal are restricted to those set out under subsection 58(1) of the DESDA. The Applicant has not satisfied me that the appeal has a reasonable chance of success on this ground.

(h) Erroneous finding of fact

[38] Counsel submits that the General Division erred in finding that the Applicant had the capacity to form and express the intention to apply for a survivor's pension, given the medical evidence before it.

[39] Essentially counsel is requesting that we reassess the finding regarding the Applicant's capacity to form or express an intention. Subsection 58(1) of the DEDSA does not contemplate a reassessment. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(i) *Charter of Rights and Freedoms*

[40] Counsel challenges the constitutional validity of sections 60 and 72 of the *Canada Pension Plan.* He submits that these sections disproportionately impact women

with disabilities and, in particular, women with disabilities who are single parents of young children with disabilities and that these sections therefore infringe upon the Applicant's equality rights under section 15 of the *Canada Charter of Rights and Freedoms.* Counsel further submits that these sections cannot be saved under section 1 of the *Charter.*

[41] These submissions were not advanced by or on behalf of the Applicant in the proceedings before the General Division. The Respondent submits that, as such, the Appeal Division cannot now consider them, or put another way, the Applicant should not now be able to raise a *Charter* argument for the first time at the Appeal Division. The Respondent relies on a decision of my colleague in *S.Z. v. Canada Employment Insurance Commission*, 2015 SSTAD 632 at paras. 18-19, who quoted with approval *Andrade v. Canada (Attorney General),* 2014 FCA 93 at para. 10.

[42] In *Andrade,* the applicant there advanced an argument for the first time. The Federal Court of Appeal held that the issue in a judicial review application is whether the decision-maker made a reviewable error. It held that the Employment Insurance Umpire "cannot possibly have made such an error by reference to facts and arguments which he did not have before him and could not address". My colleague followed this reasoning in *S.Z.,* where the Appellant raised a section 15 *Charter* argument for the first time before the Appeal Division.

[43] I concur with my colleague that, as a general rule, *Charter* issues normally should not be raised for the first time on appeal. There is however some discretion to do so.

[44] In *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 3, which involved an application for leave to intervene, the applicant raised the *Charter* for the first time. The applicant pointed out that it was not challenging the *Limitation Act* in that case, but rather, using the *Charter* solely as an interpretive tool. The applicant proposed to file various materials, including expert reports and field studies. The respondent objected on the ground that expert evidence had been led and there had been no opportunity and would be no opportunity to challenge the evidence. Sopinka J. wrote that it was difficult to determine on an

application whether the proposed *Charter* argument would prejudice the respondent. He held as follows:

> Prejudice would be occasioned if the Charter argument would have been affected by additional evidence at trial. If the respondent might have adduced other evidence material to the *Charter* argument, there would be prejudice in allowing the *Charter* to be raised for the first time in this Court.

[45] The application to intervene was allowed, and the respondent was free to submit on the hearing of the appeal that the *Charter* does not apply and should not be raised at that stage because it would occasion prejudice. Sopinka J. determined that the Supreme Court of Canada on appeal would be in a position to decide whether the *Charter* should be considered in the circumstances.

[46] Unlike *M.(K.)*, here, the Applicant is challenging the constitutionality of sections 60 and 72 of the *Canada Pension Plan.* The Applicant is seeking to strike down sections of the *Canada Pension Plan*, which is an extreme remedy.

[47] L'Heureux-Dubé J. built on the approach set out by Sopinka J. In a dissenting opinion in *R. v. Brown,* [1993] 2 S.C.R. 918 at para. 20, she found that there was discretion to allow a *Charter* argument to be raised for the first time, provided that the following three criteria were met:

> First, there must be a sufficient evidentiary record to resolve the issue. Second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial. Third, the court must be satisfied that no miscarriage of justice will result from the refusal to raise such new issue on appeal.

[48] Although L'Heureux-Dubé rendered a dissenting opinion, the majority did not take issue with it.

[49] In *R. v. Fertal (G.D.)* (1993), 145 A.R. 225; 55 W.A.C. 225; 1993 ABCA 277 (CanLII), 85 C.C.C. (3d) 411 (C.A.), at pages 415 to 416, the Alberta Court of Appeal determined that there were two hurdles that have to be overcome before *Charter* issues could be raised for the first time on appeal. These were whether the *Charter* issue was

one which could have been raised at trial but the defence chose not to, and whether the necessary evidence to rule on the *Charter* issue was before the court.

[50] More recently, as counsel for the Respondent points out, the Supreme Court of Canada in *Guindon v. Canada,* 2015 SCC 41 at paras. 20 and 22, has held that the discretion to entertain a *Charter* issue for the first time on appeal is not to be exercised routinely or lightly:

> [20] . . . Whether to hear and decide a constitutional issue when it has not been properly raised in the courts below is a matter for the Court's discretion, taking into account all of the circumstances including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice.
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> . . .
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> [22] The test for whether new issues should be considered is a stringent one. As Binnie J. put it in *Sylvan Lake*, "The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice": para. 33.

[51] While the Appeal Division may have some discretion to hear *Charter* issues raised for the first time on an appeal, given the circumstances and the jurisprudence by which I am bound to follow, I am of the view that it would be inappropriate to exercise any jurisdiction which I might have on the facts of this case. The Respondent would be prejudiced by the lack of an evidentiary record and there are no findings by the General Division dealing with the issues raised by the Applicant.

[52] Even if that were not so, as counsel for the Respondent further submits, the Supreme Court of Canada has determined that if an administrative tribunal has the jurisdiction to determine a constitutional issue, it must first be determined there, as the administrative appeal process cannot be circumvented: *Okwuobi v. Lester Pearson School Board,* 2005 SCC 16. This was followed in *E.U. v. Canada*, 2013 FCA 174 at para 5. Although the *Charter* was raised for the first time in both cases before the courts, as opposed to a second-tier administrative tribunal such as the Appeal Division, it seems to me that the same reasoning ought to apply here.

[53] I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[54] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division