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

Citation: *D. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 246

Tribunal File Number: AD-15-887

BETWEEN:

D. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

HEARD ON June 22, 2016

DATE OF DECISION: June 30, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative for the Respondent:	Jennifer Hockey (Counsel)
	Marie-Eve Morel (Law student and observer)

DECISION

[1] The appeal is denied.

INTRODUCTION

[2] This is an appeal of a decision of the General Division (GD) of the Social Security Tribunal summarily dismissing the Appellant's appeal for additional *Canada Pension Plan* (CPP) death and survivor's benefits. The GD upheld the Respondent's finding that the deceased contributor, the Appellant's late wife, made no more than 10 years of valid contributions to the plan.

[3] No leave for appeal 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 GD.

OVERVIEW

[4] The Appellant's late wife, the deceased contributor, passed away in February 2010. The Appellant submitted an application for a CPP death benefit and survivor's pension in March 2010. The Respondent initially denied the application because the deceased contributor did not have at least 10 years of valid contributions to the CPP. Upon receiving income tax reassessments for the years 2004 and 2005, the Respondent revised its position and awarded the Appellant the death benefit and survivor's pension in amounts based on 10 years of contributions.

[5] On May 17, 2013, the Appellant appealed this determination to the GD, claiming that the deceased contributor had actually worked for 34 years and contributed to the CPP in every one of those years.

[6] On April 22, 2015, the GD sent of Notice of Intention to Summarily Dismiss advising the Appellant that his appeal appeared to have no reasonable chance of success. The Notice invited the Appellant to make written submissions explaining why his appeal should not be dismissed. A filing deadline of May 29, 2015 was set.

[7] The Notice of Intention to Summarily Dismiss was sent to the Appellant's last known address by Canada Post registered mail and, according to tracking information, was successfully delivered on May 6, 2015. The package was signed for by "D. M."

[8] In a decision dated June 10, 2015, the GD summarily dismissed the Appellant's appeal on the basis that there was no evidence the deceased contributor had made valid contributions to the CPP for more than 10 years.

[9] In a letter dated June 11, 2015 and received by the GD on June 18, 2015, the Appellant wrote that he had recently been discharged from hospital, having been admitted for five weeks. He said that he was unable to get his mail during this time and had just received the Notice of Intention to Summarily Dismiss. He acknowledged having missed the May 29, 2015 deadline but wanted to object to his case being summarily dismissed.

[10] On August 10, 2015, the Appellant filed an appeal of the summary dismissal decision with the Appeal Division (AD) of the Social Security Tribunal alleging bias on the part of the GD. He also disclosed that he was in the hospital during May and June.

[11] In a notice dated April 12, 2016, the AD scheduled a hearing by teleconference for the following reasons:

(a) Additional information was needed;

(b) The form of hearing would provide for any special accommodations required by the parties;

(c) The form of hearing would respect the requirements under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[12] At the same time, the AD asked the Appellant to provide any records that documented his two-month hospital stay in 2015, including any medical reports that might have accounted for his inability to respond to the Notice of Intention on a timely basis.

[13] Canada Post tracking information indicates that the Appellant received the Notice of Hearing on April 14, 2016. As of the May 13, 2016 filing deadline, the Appellant had not made any submissions. The Respondent's submissions were received on September 26, 2015.

[14] The Appellant did not join the hearing teleconference on the scheduled date and time.

THE LAW

[15] According to subsection 58(1) of the DESDA the only grounds of appeal are that:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

[16] Subsection 53(1) of the DESDA states that the GD must summarily dismiss an appeal if satisfied that it has no reasonable chance of success.

[17] Section 22 of the SST Regulations states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[18] Subsection 97(1) of the CPP provides that a Record of Earnings (ROE) shall be conclusively presumed to be accurate and may not be called into question after four years have

elapsed from the end of the year in which the entry was made. Subsection 97(2) allows the Minister to rectify the ROE if furnished with information that persuades him, in his discretion, to do so.

[19] In accordance with subsection 44(3) of the CPP, a contributor will be considered to have made contributions for not less than the minimum qualifying period if the contributor made contributions:

> (a) For at least one-third of the total number of years included wholly or partly within his contributory period with a minimum of three years; or
>
> (b) For at least 10 years.

[20] Section 49 of the CPP provides that the contributory period commences on a contributor's 18th birthday and ends on the month for which he or she last made a contribution or the month in which he or she dies.

STANDARD OF REVIEW

[21] Until recently, it was accepted that appeals to the AD were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[1]. In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[22] The Federal Court of Appeal decision, *Canada (MCI) v. Huruglica*[2], has rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

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[1] *Dunsmuir v. New Brunswick,* [2008] SCR 190, 2008 SCC 9
[2] *Canada (Minister of Citizenship and Immigration) v. Huruglica,* 2016 FCA 93

ISSUES

[23] The issues before me are as follows:

(a) What standard of review applies when reviewing decisions of the GD?

(b) Did the Appellant receive the GD's Notice of Intention to Summarily Dismiss?

(c) Did the GD err in summarily dismissing the Appellant's appeal based on a finding that the deceased contributor had made no more than 10 years of contributions?

(d) Did the GD display bias in coming to its decision?

SUBMISSIONS

[24] The Appellant made no submissions on the appropriate standard of review or the level of deference owed by the AD to determinations made by the GD.

[25] In his letter dated June 11, 2015, the Appellant wrote that he had not received the Notice of the Intention to Summarily Dismiss until after the submission deadline because he was hospitalized for five weeks and unable to receive his mail.

[26] He claimed that his deceased spouse made many more years of contributions than what the Respondent gave her credit for. He suggested that any delay in amending her ROE was caused by "bureaucratic bungling" by the Respondent and by the Canada Revenue Agency, who repeatedly lost documents. He wished to present his case before an objective and unbiased tribunal.

[27] In his Notice of Appeal dated August 10, 2015, the Appellant wrote that he was in the Sussex Health Centre for two months (May and June). He repeated his earlier allegations that his late wife's employable years were not counted.

[28] The Respondent's submissions on the standard of review were made prior to *Huruglica*, which was released on March 29, 2016. The submissions discussed in comprehensive detail the standards of review and their applicability to this appeal, concluding that a standard of

correctness was to be applied to errors of law, and reasonableness was to be applied to errors of fact and mixed fact and law.

[29] The Respondent submits that the GD met its requirement under section 22 of the SST Regulations by giving the Appellant a notice in writing before summarily dismissing his appeal and allowed him a reasonable period of time to make his submissions. The Appellant received the notice and made no further submission regarding his appeal other than providing a Hearing Information Form.

[30] The Respondent further submits that the GD reasonably applied the facts to the law when it established, pursuant to section 49 of the CPP, that the contributory period of the Appellant's late spouse was 39 years, as it commenced in April 1970 (when she turned 18) and ended upon her death in February 2010.Therefore, the minimum qualifying period in order to be entitled to receive a death and or survivors benefit was 10 years of valid contributions by application of the formula in paragraph 44(3)(a) of the CPP.

[31] The Respondent submits that, as per paragraph 52(3)(a) of the CPP, a contributor is deemed to have made valid contributions for any years for which her unadjusted pensionable earnings exceeds her basic exemptions for the year. The Year's Basic Exemption is defined by section 20 of the CPP and it has been frozen at $3,500 since January 1, 1998. According to the deceased contributor's ROE, she had 10 years of valid CPP contributions from 1994 to 2000 (inclusively) and 2004, 2005 and 2008.

[32] If the Appellant believes his late wife made as many as 34 years of valid contributions, rather than 10, he has not provided any further evidence that would substantiate his claim. The Respondent submits that the GD's decision is reasonable, transparent and the only acceptable outcome based on the law and the facts.

ANALYSIS

(a) What is the appropriate standard of review?

[33] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal

Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law. "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[34] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> … the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object… The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[35] The implication here is that the standards of reasonableness or correctness will not apply unless those words or their variants are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(a) and (b) do not qualify errors of law or breaches of natural justice, suggesting the AD should afford no deference to the GD's interpretations.

[36] The word "unreasonable" is nowhere to be found in paragraph 58(1)(c), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the AD should intervene when the GD bases its decision on an error that is clearly egregious or at odds with the record.

(b) Did the Appellant receive the GD's Notice of Intention to Summarily Dismiss?

[37] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his or her case, that he or she has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. It relates to issues of procedural fairness before the GD, rather than to the process involving the Respondent.

[38] The Appellant claims that he did not receive the Notice of Intention to Summarily Dismiss because he was hospitalized for several weeks in May and June 2015, which precluded him from receiving his mail. The facts tell a different story. Canada Post tracking information indicates that the Appellant personally accepted and signed for the Notice of Intention on May 6, 2016. The Notice set out the reasons for which the GD believed the appeal had no reasonable chance of success and invited the Appellant to respond within a certain timeframe, which he failed to do. When the GD member prepared her written reasons for summarily dismissing the appeal on June 10, 2015, she had good reason to believe that the Appellant had received the Notice and that proceeding with the decision would not cause him any injustice.

[39] After the Appellant appealed the summary dismissal, the AD asked him to forward records documenting his hospitalization or other medical reasons that might have accounted for his inability to respond to the Notice of Intention on a timely basis. He did not respond. He was again afforded an opportunity in an oral hearing to explain how the GD had treated him unfairly but he did not appear, despite having received the Notice of Hearing.

[40] Having reviewed the record, I must agree with the Respondent that the Appellant was given proper notice of the intent to summarily dismiss and provided with ample opportunity to make his case for higher death and survivor's benefits. I do not see how the GD acted contrary to the principles of natural justice.

(c) Did the GD err in finding the deceased contributor made 10 years of contributions?

[41] As discussed above, the Appellant was given an opportunity to present his case but never submitted evidence to substantiate his claim that his late wife worked and contributed to the CPP beyond the 10 years already established. In his submissions, he suggested that section 97 in effect set his wife's ROE in stone, and more than four years after her last contribution in 2010, there was nothing that could be done to amend it. This is not true, as subsection 97(2) makes it clear that the Respondent has the discretionary power to consider proposed changes to a contributor's ROE and, where it deems appropriate, make corrections. It was open to the Appellant to introduce evidence that the deceased contributor had more than 10 years of earnings and contributions, but nothing in the evidentiary record indicates that he did so.

[42] In the absence of evidence to the contrary, the deceased contributor's 10 years of valid contributions are presumed to be accurate and must stand as the basis on which the Appellant's entitlement to Death and Survivor benefits as calculated. I have reviewed the Respondent's application of the facts to the law and, like the GD, have found no error. The deceased contributor was born on March 15, 1952 and thus turned 18 in 1970. Pursuant to section 49 of the CPP, her contributory period commenced in April 1970 and ended upon her death in February 2010, a period of more than 39 years. In applying paragraph 44(3)(a), one-third of the contributory period represents 13 years. The minimum number of years of valid contributions required in order for the Appellant to receive a death and/or survivor benefit is 10 years, which is the lesser between 13 and 10 years. According to the ROE, the first year the Appellant's late wife made any contributions after her 18th birthday was 1991, and the last year just prior to her death was 2008, when she was 56 years of age. As indicated above, the ROE indicates that the Appellant made valid contributions in 10 years: 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2004, 2005 and 2008.

[43] I will not allow the appeal on this ground.

(d) Did the GD display bias in coming to its decision?

[44] The Appellant alleges that GD was biased, and although he did not describe any specific examples of potentially prejudicial behaviour, it may be presumed he was referring to the fact that his appeal was disposed of by way of summary dismissal.

[45] This type of allegation is serious, but a negative outcome is not by itself an indicator of bias. In the absence of any evidence to support a reasonable apprehension of bias, allegations alone are insufficient to make out an arguable case.

CONCLUSION

[46] For the reasons set out above, the appeal is dismissed.

Member, Appeal Division