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

Citation: *R. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 329

Tribunal File Number: AD-16-382

BETWEEN:

R. H.

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: Neil Nawaz

DATE OF DECISION: August 22, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] This is an appeal of a decision of the General Division (GD) of the Social Security Tribunal (SST). The GD summarily dismissed the Appellant's appeal of the Respondent's refusal to accept his attempt to withdraw his application for a division of unadjusted pensionable earnings (DUPE or credit split) under the *Canada Pension Plan* (CPP). The GD found that a DUPE was mandatory once an application was submitted, even if the applicant had changed his mind.

[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 and his former wife cohabited from 1981 to 2009. They were married on February 5, 1987 and divorced on December 13, 2011. On March 24, 2014, the Appellant applied for a CPP credit split, which the Respondent approved by way of a letter dated September 10, 2014, accompanied by a printout of the Appellant's unadjusted pensionable earnings before and after the split.

[5] The Appellant requested a withdrawal of his application, which the Respondent denied initially and upon reconsideration. The Appellant then appealed the reconsideration decision to the GD on January 23, 2015.

[6] On September 14, 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.

[7] In a decision dated December 29, 2015, the GD summarily dismissed the Appellant's appeal, finding that there was no legal basis by which he could withdraw his DUPE application.

[8] In a letter dated February 29, 2016, the Appellant notified the Appeal Division (AD) of the Social Security Tribunal that he was displeased with the GD's decision and the process that had led to it. The Appellant was deemed to have perfected his appeal to the AD on time when he submitted a completed Application Requesting Leave to Appeal to the Appeal Division (notwithstanding his use of the incorrect form) on April 4, 2016.

[9] I have decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

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

THE LAW

DESDA and Associated Regulations

[10] 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.

[11] 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.

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

CPP and Associated Regulations

[13] Under section 55.1 of the CPP, a former spouse may apply for a DUPE, which triggers an equitable sharing of CPP credits after a separation or divorce. According to paragraph 55.1(1)(a), a DUPE is mandatory in the case of spouses who divorced after January 1, 1987.

[14] In accordance with section 45(3) of the CPP Regulations, an applicant for a DUPE under section 55 or paragraph 55.1(1)(b) or (c) of the CPP may withdraw the application by sending a notice in writing to the Respondent not later than 60 days after the date of receipt by the applicant of notification of the decision respecting the application.

[15] In accordance with subsection 55.2(4) of the CPP, the Respondent shall, without delay after being informed of a judgment granting a divorce or a judgment of nullity of a marriage or after receiving an application under section 55 or paragraph 55.1(1)(b) or (c), notify each of the persons subject to the division, in the prescribed manner, of the periods of unadjusted pensionable earnings to be divided.

ISSUES

[16] The issues before me are as follows:

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

(b) Was the Appellant entitled to an oral hearing before a multi-person panel?

(c) Did the GD err in law or breach a principle of natural justice in summarily dismissing the Appellant's appeal?

(d) Did the GD err when it dismissed the Appellant's appeal because it found no legal basis by which he could withdraw his DUPE application?

SUBMISSIONS

[17] In a letter dated March 29, 2016, the Appellant made the following submissions:

(a) He expected he would be permitted to meet and make an oral presentation to a "tribunal," a word that suggests a panel of more than one person. Instead, he was forced to make his case by mail to a single individual.

(b) Once he applied for the DUPE, he was "locked in" and the result predetermined. He did not understand the implications of applying for a credit split, and no one ever explained to him the potential outcome. If he had known the formula beforehand, he never would have applied. He was "shocked" when the Respondent advised him of the results of the split. He described the process as "entrapment."

(c) If the process were fairer, he would not have attempted to withdraw his application. Splitting CPP pension credits should be subject to a sliding scale similar to income tax.

[18] 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.

[19] In a letter dated May 19, 2016, the Respondent incorporated by reference its prior submissions to the GD as follows:

(a) The language of the CPP makes it clear that a DUPE shall take place as set out in paragraph 55.1(1)(a), in the Appellant's circumstances. Once the Respondent receives the information prescribed by subsection 54(2) of the CPP Regulations, there is an obligation on the Respondent to perform the credit split in accordance with paragraph 55.1(1)(a) of the CPP. While there are exceptions to the mandatory credit split, none of the exceptions apply to the Appellant and his former wife.

(b) The credit split was performed for the period of 1981 to 2009, and the Appellant was notified of the resulting decrease in his retirement benefits by letter dated September 10, 2014. On October 20, 2014, the Appellant was informed that his credit split application could not be withdrawn, as it did not fall under the exception set out in subsection 45(3) of the CPP Regulations.

(c) The Appellant does not meet the requirements in order to withdraw his application, as he and his former wife divorced after January 1, 1987. Accordingly, as the credit split was performed in accordance with paragraph 55.1(1)(a) of the CPP, it is a mandatory split and the credits are split permanently.

(d) While the Appellant may be unhappy with the outcome of the credit split, the division was performed according to the law, and there was no positive requirement to advise the Appellant on the impact it was likely to have on his finances.

[20] Addressing the standard of review, the Respondent noted that the AD must operate within the confines of its enabling legislation. It does not have discretion to deviate from the statutory scheme, which does not allow the Appellant to submit new evidence in support of an appeal.

ANALYSIS

(a) What is the appropriate 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

[1] *Dunsmuir v. New Brunswick*, [2008] SCR 190, 2008 SCC 9

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.

[23] 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."

[24] 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].

[25] 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.

[26] 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"

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[2] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93

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) Was the Appellant entitled to an oral hearing?

[27] The Appellant has suggested that he was entitled to, or at least had a reasonable expectation of, an oral hearing before a multi-person panel, but the law is unambiguous on these matters. The principles of natural justice are concerned with ensuring that appellants have a reasonable opportunity to present their case, that they have a fair hearing and that decisions are rendered free of bias. The DESDA and SST Regulations do not require a set number of SST members to hold a hearing; *a contrario*, hearings are held before one member. Section 21 of the SST Regulations makes it clear that there is no right to an oral hearing. Even when an appellant has an arguable case, the GD has the discretion to decide how an appeal will be heard, whether in writing, by teleconference, videoconference or in person. The absence of any right to an oral hearing is underlined by the fact that the DESDA also provides for a summary dismissal process.

(c) Did the GD err in summarily dismissing the Appellant's appeal?

[28] Where questions of law and natural justice are concerned, the prevalent jurisprudence suggests that an appellate body should show no deference when reviewing the actions of the trier of fact. In this case, the GD cited subsection 53(1) of the DESDA at paragraph 3 of its decision, correctly stating that an appeal must be summarily dismissed if it has no reasonable chance of success.

[29] It is not enough to merely recite the correct test without properly applying it to the established facts. Although the Federal Court of Appeal has not yet settled on a single approach to subsection 53(1), it has previously reframed the test for summary dismissal as follows [3]: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? As long as there is an adequate

[3] *Lessard-Gauvin v. Canada (AG)*, 2013 CAF 147, 2013 FCA 147; *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (AG)*, 2004 FCA 264

factual foundation to support the appeal and the outcome is not obvious, then the matter is not appropriate for a summary dismissal. A case that is merely weak would not be appropriate for a summary disposition, as it would necessarily involve weighing the evidence and assessing the merits of the case.

[30] Having reviewed the law and the facts in this case, I must conclude that the GD did not err in law when it invoked the summary dismissal provision. For reasons that I will explain in detail below, I find the appeal had no reasonable chance of success.

(d) Did the GD err in finding no basis to permit withdrawal of the DUPE application?

[31] In this case, the GD considered whether, on the facts before it, the appeal met the high threshold set out under subsection 53(1) of the DESDA. I find that there was plain and obvious on the face of the record that the appeal was bound to fail.

[32] Having found that the Appellant and his former wife were divorced after January 1, 1987, the GD determined that section 55.1 (and not section 55) of the CPP governed the credit split application. In accordance with paragraph 55.1(1)(a), a DUPE is mandatory following a judgment granting a divorce after the Respondent has received the required information.

[33] It is true that section 45(3) of the CPP Regulations permits certain DUPE applicants to withdraw their application by submitting a written notice no later than 60 days after the Respondent's initial decision. However, this right only applies to DUPE applications made under section 55 or under paragraphs 55.1(1)(b) or (c), which refer to separated and common-law spouses, respectively. In this case, the parties were neither separated nor common-law but were divorced. The GD correctly determined that paragraph 55.1(1)(a) of the CPP had to be applied and therefore concluded no withdrawal was possible. In my view, the GD was justified, under these circumstances, to find the Appellant had no reasonable chance of success on appeal.

[34] The Appellant has suggested that the provisions of the CPP are confusing and unfair. He has also suggested that the Respondent was under an obligation to warn him in advance of the potential adverse effects of applying for a DUPE. I cannot know what guidance, if any, was given to the Appellant before he submitted his application, but there is nothing in the law that requires the Respondent to advise applicants of the implications of seeking a credit split. The

Respondent may choose to offer advice or not, but neither the GD nor the AD has the authority to review such a discretionary act.

[35] In any case, both the GD and the AD must follow the letter of the law. If the Appellant is asking me to exercise fairness and reverse the GD's decision, I lack the discretionary authority to do so and can only exercise such jurisdiction as granted by the AD's enabling statute. Support for this position may be found in *Pincombe v. Canada*,[4] among other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

CONCLUSION

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

Member, Appeal Division

[4] *Pincombe v. Canada* (AG) [1995] FCJ No. 1320 (FCA)