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

Citation: *A. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 438

Tribunal File Number: AD-15-1010

BETWEEN:

A. D.

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: November 14, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] The Appellant seeks to appeal a decision of the General Division (GD) of the Social Security Tribunal (SST) dated September 1, 2015. The GD summarily dismissed her appeal for a division of unadjusted pensionable earnings (DUPE or credit split) under the *Canada Pension Plan* (CPP) because the Appellant's DUPE application was made after the three-year time limit set out in subsection 55(1) of the CPP.

[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.

[4] Having determined that no further hearing is required, this appeal is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations* (SST Regulations).

OVERVIEW

[5] The Appellant and her former husband were married on June 12, 1976 and divorced on November 4, 1983. The Appellant did not apply for a DUPE until 27 years after the divorce. The Appellant's former spouse never signed a waiver agreeing to waive the three-year time limit, and he is now deceased.

[6] The Appellant applied for a CPP credit split in May 2011. The Respondent denied the application initially and on reconsideration. On January 12, 2012, the Appellant appealed these denials to the Office of the Commissioner of Review Tribunals and this appeal was transferred to the GD in April 2013.

[7] In a decision dated September 1, 2015, the GD summarily dismissed the Appellant's appeal because her DUPE application was made more than three years after she and her former husband were divorced, as per subsection 55(1) of the CPP.

[8] On September 15, 2015, the Appellant filed an incomplete appeal of the summary dismissal decision with the Appeal Division (AD) of the Tribunal, alleging errors on the part of the GD. Following two written requests for missing mandatory information, the Appellant perfected her appeal on May 19, 2016. I have decided that an oral hearing is unnecessary in this appeal, which will 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) This form of hearing respects the requirements under the SST Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[9] The Appellant's submissions were set out in her letter of appeal dated September 9, 2015 and in subsequent addenda. The Respondent replied in a submission dated July 4, 2016.

THE LAW

[10] 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. Under subsection 56(2), no leave is required to appeal a summarily dismissal to the AD.

[11] Subsection 54(1) of the DESDA makes it clear that the GD can only take an action that should have otherwise been taken by the Minister: "The General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or Commission in whole or in part or give the decision that the Minister or Commission should have given".

[12] 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.

[13] According to subsection 58(1) of the DESDA, the only grounds of appeal are 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.

[14] Subsection 55(1) of the CPP provides that subject to certain conditions, where former spouses divorced after January 1, 1978 and before January 1, 1987, the application for a DUPE must be made within 36 months of the divorce, unless both former spouses agree in writing to the application being made after this time period.

STANDARD OF REVIEW

[15] 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.

[16] 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.

---

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

ISSUES

[17] The issues before me are as follows:

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

(b) Did the GD err in summarily dismissing the Appellant's claim for a credit split because her DUPE application was made after the three-year time limit?

SUBMISSIONS

[18] The Appellant made the following submissions:

(a) She was not aware of the three-year time limit set out in subsection 55(1) of the CPP but hopes her appeal will be considered, because she suffers from ongoing health problems and has been living in poor circumstances since her divorce in 1983.

(b) She has not seen her husband since her divorce and was not aware that he had passed away.

[19] The Respondent made the following submissions:

(a) Subsection 55(1) of the CPP provides that, subject to certain conditions, where former spouses divorced after January 1, 1978 and before January 1, 1987, the application for a DUPE must be made within 36 months of the divorce, unless both former spouses agree in writing.

(b) The Appellant's dupe application was received 17 years after her divorce, well after the three-year limit. The Appellant's former spouse has not signed a waiver agreeing to waive the time limit, and it appears he is deceased.

(c) In the recent case of *MESD v. B.T. and J.S.*,[3] the AD concluded that subsection 55(1) does not violate the *Canadian Charter of Rights and Freedoms.*

(d) The GD correctly concluded that the Appellant is not eligible for a credit split, as her application was made after the 36-month time limit set out in subsection 55(1). Therefore, the Appellant's appeal had no reasonable chance of success under subsection 53(1) of the DESDA, and the GD has no discretion to act otherwise than to summarily dismiss the appeal.

ANALYSIS

(a) Standard of Review

[20] 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."

[21] 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].

[22] 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

[3] *Minister of Employment and Social Development v. B. T. and J.S.*, 2015 SSTAD 107.

qualify errors of law or breaches of natural justice, which suggests the AD should afford no deference to the GD's interpretations.

[23] 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) Summary Dismissal

[24] The GD denied the Appellant's appeal because her DUPE application was received in May 2011, more than 27 years after her divorce and well past the three-year time limit specified in subsection 55(1) of the CPP.

[25] Having carefully examined the decision, I can find no indication that the GD breached any principle of natural justice or committed an error in fact or law. The GD assessed the record and concluded that the Appellant, having been divorced between January 1, 1978 and January 1, 1987, was effectively barred from applying for a credit split, in the absence of a written waiver from her now-deceased former husband. The GD saw no arguable case on any ground raised by the Appellant, and I see no reason to interfere with its reasoning. My authority permits me to determine only whether any of his reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. While the GD's analysis did not arrive at the conclusion the Appellant would have preferred, it is not my role to reassess the evidence, but rather to determine whether the decision is defensible on the facts and the law.

[26] In her notice of appeal, the Appellant wrote that she was unaware of the time limitation or the requirement to obtain a written waiver, but unfortunately the CPP makes no allowances for claimants, or potential claimants, who may be ignorant of the intricacies of the law. She also suggested that it was only fair that her former husband's pensionable earnings be divided to her benefit, asking the GD (and now the AD) to apply their discretion to effect a credit split because of her financial difficulties. Unfortunately, the SST has no discretion to provide such a remedy; it can only exercise such jurisdiction as granted by its enabling statute. Support for this

position may be found in *Canada (MHRD) v. Tucker*,[4] among many 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

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

Member, Appeal Division

[4] *Canada (Minister of Human Resources Development) v. Tucker,* 2003 FCA 278