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

Citation: *A. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 64

Tribunal File Number: AD-16-532

BETWEEN:

A. P.

Applicant

and

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

Respondent

and

P. P.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: February 23, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Added Party, being the Applicant's former spouse, applied for a *Canada Pension Plan* (CPP) division of unadjusted pensionable earnings (DUPE) in September 2011. The Respondent proceeded with the DUPE, establishing a period of cohabitation that reflected a separation date of April 1, 1996. Following a reconsideration request from the Applicant in August 2012, the Respondent applied a separation date of May 1, 1995.

[2] In October 2012, the Applicant appealed the Respondent's reconsideration decision to the Office of the Commissioner of Review Tribunals, which transferred the appeal to the General Division of the Social Security Tribunal (Tribunal) on April 1, 2013. The appeal was summarily dismissed by the General Division on February 17, 2015, on the basis that it had no reasonable chance of success. The Applicant appealed to the Appeal Division of the Tribunal; leave to appeal was not required because the General Division decision was a summary dismissal. Member J. Lew of the Appeal Division allowed the appeal (*A. P. v. Minister of Employment and Social Development*, 2015 SSTAD 973), finding that the General Division ought not to have summarily dismissed the appeal because there was an arguable case to be heard on the merits:

> [46] Counsel for the Respondent submits that a summary dismissal was the appropriate disposition on the issue of the date of separation, as the date of separation was not contested (at paragraphs 4 and 32 of his submissions). I cannot accede to this submission, as the date of separation has been a contentious issue from the outset. There have been no fewer than five possible dates of separation which have been offered between the Appellant and the Interested Party at various times: no later than April 1991; May 28, 1991; May 1, 1995; April 1, 1996; and September 10, 1997. Some of these dates are much less credible than others, but there is a documentary trail for these dates, some more limited than others. …
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> [57] Having found that it preferred the separation agreement as representing the best evidence of the date of separation, over other arguable dates, it seems that the General Division concluded that the matter was appropriate for a summary dismissal. However, the fact that the General Division was required to assess and weigh the evidence indicated that there were triable issues. While the General Division was entitled to make findings of fact as to whether the separation agreement could be superseded and what represented the best evidence as to the date of separation, this went well beyond

> applying the test for a summary dismissal. It would have been a different matter altogether if the parties had unanimously agreed that the date of separation was May 1, 1995 and there was no other evidence or suggestion that there could have been an alternative date of separation. If the General Division had to analyze the evidence, assign weight and decide upon competing dates of separation, it cannot be said that there was no reasonable chance of success, no triable issue, or no merit to the appeal. …
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> [58] Here, the General Division muddied the distinction between a manifestly clear, "utterly hopeless" case without merit and in this case, a probable very weak case, and thereby improperly characterized the dismissal of the appeal as a summary dismissal. The General Division ought not to have summarily dismissed the appeal on the issue of the date of separation.

[3] The Applicant's appeal was thus referred back to the General Division for reconsideration on the issue of the date of separation. A hearing by teleconference was held on January 19, 2016, and a decision was rendered on January 25, 2016. This second General Division decision dismissed the Applicant's appeal, finding that the separation date was May 1, 1995.

[4] The Applicant sought leave to appeal the second General Division decision to the Appeal Division, and perfected his application on May 16, 2016. Pursuant to s. 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA), such application must be made in the prescribed form and manner within "90 days after the day on which the decision is communicated to the appellant." The Applicant, who lives in Sri Lanka, had advised in his initial correspondence (date stamped April 6, 2016) that he had received the General Division decision on February 28, 2016. While s. 19 of the *Social Security Tribunal Regulations* (Regulations) states that decisions are deemed communicated 10 days after the mailing date, I have the authority to vary this provision under s. 3(1)(*b*) of the Regulations, in special circumstances. The Applicant's place of residence constitutes special circumstances for the purposes of determining when the General Division decision was communicated to him. I find that February 28, 2016 was the relevant date of communication, rather than the deemed date of February 5, 2016. Since the Applicant perfected his leave application within 90 days of February 28, 2016, I conclude that his application was filed on time.

[5] I turn, therefore, to consideration of the Applicant's request for leave to appeal.

ANALYSIS

[6] Pursuant to s. 56 of the DESDA, an appeal to the Appeal Division (other than an appeal of a summary dismissal) may only be brought if leave to appeal is granted. Subsection 58(2) of the DESDA provides that "Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[7] A leave to appeal proceeding is a preliminary step to an appeal on the merits. It is a first and lower hurdle to be met. The Applicant does not have to prove the case at the leave stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success. This means having some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

[8] The only grounds upon which an appeal may succeed are those identified in s. 58(1) of the DESDA:

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.

[9] In his application, the Applicant states that the General Division violated "in some form or another" each of the above-cited grounds of appeal. He makes a number of claims, which are addressed separately below.

General Division assessment of May 1996 declaration by the former spouse

[10] The Applicant's primary concern is that the May 1996 declaration by his former spouse was treated with disdain by the General Division. He states that this declaration was described

as a fragmentary document, possibly a draft, and as having no legal significance, in contradiction to the views of Ms. Lew of the Appeal Division, who, he says, accepted its *bona fides*. In his view, the General Division member's conclusion that an alternative date could not be independently corroborated, and would not in any case override the separation agreement, is untenable.

[11] First, a review of the Appeal Division decision indicates that Ms. Lew mentioned the declaration made by the former spouse several times, but made no comment on the weight to be afforded this document. As noted by the Applicant, Ms. Lew wrote that the date of separation had been contentious from the outset, with no fewer than five possible dates having been offered. Indeed, she returned the matter to the General Division precisely so that a determination could be made, at that Division, as to the date of separation. The fact that Ms. Lew found that "it cannot be said that there was no reasonable chance of success, no triable issue, or no merit to the appeal" does not in any way predetermine the outcome of the appeal once returned to the General Division. She did not issue any directions limiting the scope of the appeal to specific alternative separation dates.

[12] Moreover, a review of the General Division decision confirms that the member considered the oral and written evidence supporting the possible separation dates, ultimately placing greatest weight upon the date found in the separation agreement. It was the General Division member's assessment of the former spouse's declaration that it was intended more as a qualitative description of the marriage than a statement of legal significance; this was contrasted with the significance of the date of separation in a separation agreement, outlined in the preceding paragraph of his decision. The General Division member's description of the May 1996 statement as a "fragmentary document" which "might well have been a draft" would appear to refer simply to the fact that only the third page of the former spouse's application before the Family Court was in evidence. These are all illustrations of the member's consideration of the evidence before him.

[13] It is apparent that the Applicant is dissatisfied with the General Division member's weighing of the evidence and with his conclusion as to the date of separation. However, assigning weight to evidence is the province of the trier of fact, and disagreement with the

outcome of this process is not a ground of appeal before the Appeal Division. Rather, a factual error forms the basis of appeal only if made in a perverse or capricious manner, or without regard for the material before it. The Applicant does not point to any evidence nor provide any substantial argument that the member's finding of fact on the separation date was made in a perverse or capricious manner or without regard for the evidence. I see no reasonable chance of success on this ground.

Testimony left out of the decision

[14] The Applicant secondly submits that a fair amount of testimony was omitted "by design or error, and it constitutes a major blot in the proceedings." He does not, however, identify any specific evidence adduced through testimony which was not mentioned or considered by the General Division member. The General Division decision provides a summary of the testimony of the Applicant and his former spouse, including the Applicant's testimony that the couple had lived separate and apart under the same roof no later than April 1991. It is clear from the General Division decision that, despite this testimony, the member found the separation agreement to constitute the most reliable evidence regarding the former spouses' date of separation. Moreover, it is settled law that an administrative tribunal charged with finding fact need not refer to each and every piece of evidence in its reasons, but is presumed to have considered all the evidence before it: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. I see no reasonable chance of success on the ground that unspecified testimony was left out of the General Division decision.

General Division acted beyond its fiat and/or was biased

[15] In this respect, the Applicant states that the member was the "sole representative" of the General Division, and was also in the role of interlocutor and "Judge and Jury in his own cause." The Applicant further asserts that the General Division did not comply with the mandate given by the Appeal Division, and the member's "Submission… raises the question of bias."

[16] The Social Security Tribunal is an independent administrative tribunal established under the DESDA and, pursuant to s. 61, every appeal to the Tribunal must be heard before a single member. A General Division member is neither a party nor a representative, but a neutral

adjudicator or decision-maker, with no "cause". There is no indication that the member hearing the Applicant's appeal knew any of the parties, had a personal interest in the outcome of the appeal, or expressed any sentiment at the hearing or in the decision that would lead to a reasonable apprehension of bias. The fact that the General Division member conducted the teleconference as a sole adjudicator is mandated by law and cannot be the basis for an allegation of bias. The fact that the outcome was unfavourable to the Applicant is also not a basis for an allegation of bias.

[17] The mandate given to the General Division by the Appeal Division was to reconsider "the issue of the date of separation." Despite the Applicant's comments to the contrary, none of the five possible dates mentioned were confirmed or rejected by the Appeal Division and the General Division had full authority to determine, based on the evidence before it, the separation date. Subsection 54(1) of the DESDA allows the General Division to dismiss an appeal, or to confirm, rescind or vary a decision of the Respondent. In accordance with these powers, the General Division member accepted the separation date utilized by the Respondent in calculating the DUPE and dismissed the appeal.

[18] In consideration of the assertions made by the Applicant, I find no reasonable chance of success on the grounds that the General Division exceeded its jurisdiction or breached the principles of natural justice due to bias.

Standard of proof

[19] Finally, the Applicant disagrees with the application of the balance of probabilities as the standard of proof, preferring a decision "on the more reliable yardstick of 'beyond reasonable doubt'".

[20] As stated by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, "there is only one civil standard of proof at common law and that is proof on a balance of probabilities." It has been repeatedly affirmed that the usual civil standard of proof applies to administrative tribunals deciding on benefits under the CPP (see, for example, *Bagri v. Canada (Attorney General)*, 2006 FCA 134). It is manifestly clear that the Applicant cannot succeed on the basis of an error of law in this respect. I note that the criminal standard of proof recommended by the Applicant would in any case have made it more difficult for him to

succeed on his appeal before the General Division, since the burden of proof was upon him to establish an alternative separation date.

Result

[21] The General Division decision contains an analysis which indicates that the member meaningfully assessed the oral and written evidence, and outlined defensible reasons supporting his conclusion that May 1, 1995 was the likely date of separation. While this was not the conclusion the Applicant would have preferred, an appeal to the Appeal Division is not an opportunity to re-argue the case and ask for a different outcome. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of s. 58(1) and whether any of them have a reasonable chance of success.

[22] Having found that the Applicant does not have a reasonable chance of success in respect of the various grounds of appeal raised in his pleadings, leave to appeal is refused.

CONCLUSION

[23] The application for leave to appeal is refused.

Shirley Netten
Member, Appeal Division