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

Citation: *S. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 110

Tribunal File Number: AD-16-134

BETWEEN:

S. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: March 21, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The General Division dismissed the Applicant's appeal for a longer period of cohabitation, dating back to possibly as early as 1982. The Applicant seeks leave to appeal the decision of the General Division dated November 21, 2015, which determined that, for the purposes of a division of unadjusted pensionable earnings, the Applicant and the Added Party cohabitated from October 3, 1987 until March 1993, and that the period of division of pension credit splits is from January 1987 (January of the year when the parties began residing together), until December 1992 (December of the year before the parties separated). The General Division excluded the period from March 1984 to August 1984 from the division of unadjusted pensionable earnings, as this period amounted to less than 12 consecutive months. The Applicant filed an application requesting leave to appeal on January 12, 2016, invoking several grounds of appeal.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] 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.

[4] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300. The Applicant alleges that the General Division erred under each of these grounds.

Constitutional Issues

[5] The Applicant submits that the General Division breached his constitutional rights under the *Canadian Charter of Rights and Freedoms* "by subjecting him to the ordinary appeal process after Service Canada's reconsideration decision but not [the Added Party] after Service Canada's original decision."

[6] Subsection 20(1) of the *Social Security Tribunal Regulations* (Regulations) stipulates that if the constitutional validity, applicability or operability of any provision of the *Canada Pension Plan*, the *Old Age Security Act*, the *Employment Insurance Act*, Part 5 of the DESDA or the regulations made under any of those acts is to be put at issue before the Social Security Tribunal of Canada (Tribunal), the party raising the issue must file a notice with the Tribunal that sets out the provision that is at issue and contains any submissions in support of the issue that is raised; and at least 10 days before the date set for the hearing of the appeal or application, serve notice of that issue on the persons referred to in subsection 57(1) of the *Federal Courts Act* and file a copy of the notice and proof of service with the Tribunal.

[7] The Tribunal notified the Applicant of the notice requirements under subsection 20(1) of the Regulations. He responded by letter dated March 3, 2016, indicating that he would not be advancing the issues of his own accord, owing to lack of "energy or resources." He expected that the Appeal Division would nevertheless consider whether any constitutional infringements occurred.

[8] It is not the Appeal Division's role to fulfil the basic notice requirements on behalf of an applicant who alleges that his Charter rights have been infringed. As the Applicant has not complied with the notice requirements under subsection 20(1) of the Regulations, and

has indicated that he will not be pursuing any constitutional issues, the appeal will not be proceeding on this ground.

Natural Justice

[9] The Applicant submits that the General Division failed to observe a principle of natural justice and deprived him of his entitlement to a fair and impartial hearing by

- extending preferential treatment to the Added Party, by permitting her to enter the hearing room and to organize her documents prior to the scheduled starting time, while at the same time declining the Applicant's request to do the same;

- exerting pressure on the Applicant to begin before the scheduled start time for the hearing;

- failing to provide the Applicant with sufficient time to fully present his case, including prohibiting him from making any opening remarks or explaining his evidence, which effectively caused him to forget to adduce certain evidence;

- threatening to rule the Applicant's evidence inadmissible if he "strayed from answering … questions" or "tried providing relevant contextual information";

- prohibiting the Applicant from explaining his lack of evidence, although ultimately the General Division based its decision largely on this issue;

- permitting the Respondent to narrow the issues on appeal;

- "planting ideas and feeding answers" and asking leading questions of the Added Party on key contentious issues;

- barring the Applicant from conducting cross-examination of the Added Party on issues of credibility and on any inconsistencies;

- interrupting his cross-examination of the Applicant;

- instructing the Added Party not to respond to the Applicant's questions under cross-examination; and

- pre-judging the outcome of the proceedings.

[10] While members of the Tribunal are entitled to conduct proceedings in the manner they deem appropriate for the circumstances, it remains incumbent to respect principles of natural justice. Natural justice is concerned with ensuring that an applicant has a fair and reasonable opportunity to make 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.

[11] I am not satisfied that all of these allegations, even if they are ultimately substantiated, necessarily resulted in a breach of the principles of natural justice. For instance, interrupting the Applicant in the course of his examination of the Added Party, or instructing the Added Party not to respond to the Applicant's questions, may not have been a breach. After all, the General Division member might have determined that the Applicant's questions for the Added Party were inappropriate or wholly irrelevant.

[12] Apart from making these allegations, it would be of some assistance if the Applicant demonstrated how he was deprived of a fair hearing or how he was exposed to any bias. For instance, he alleges that the member interrupted him and did not permit him to make full oral submissions. In those circumstances, it could be of some assistance if he were to show that there were arguments that he intended to raise that he had not already addressed either in oral or written submissions, and if he were to show how they were relevant and what impact they could have had on the outcome.

[13] If some of these allegations are borne out by the recording of the hearing, there might have been a breach of the principles of natural justice. On that basis, I am prepared to grant leave to appeal on this ground. I invited the Applicant to provide me with the timestamp of the recording of the hearing to substantiate his allegations, but he declined to do so. The Applicant may wish to reconsider this position against adducing evidence to

substantiate these allegations. After all, the Applicant is required to prove his case on a balance of probabilities if he hopes to succeed on the appeal of this matter, and as I may otherwise draw the conclusion that there is no evidence to support his claims. He should also be mindful that the other parties—the Added Party included—may also refer me to any timestamps of the recording of the hearing to rebut his allegations.

Delay

[14] The Applicant submits that he has been grossly prejudiced by the Respondent's inaction and by the significant delay between the time when the Added Party sought a reconsideration of its initial decision (in which it accepted a longer period of common- law cohabitation for the purposes of a credit split), in July 1997 and when the Respondent finally responded to her request, in September 2012—a period of over 15 years. He claims that because he had been unaware of the Added Party's request for reconsideration, and because of the significant delay involved, he could not have known that he should have taken steps to preserve evidence that could have been favourable to his claim to a longer period of common-law cohabitation. He suggests that, due to the effluxion of time, any supporting evidence was lost. He also notes that one of the witnesses had passed away in the interim. This was the central issue that he had raised in his notice of appeal filed with the Office of the Commissioner of Review Tribunals in December 2012. He argues that, despite raising this issue, the General Division member did not address it, which constitutes an error of law.

[15] While the member might not have expressly addressed the issue by way of analysis, certainly the member was mindful of the delay, having given a chronology of the history of proceedings in this matter. There was and remains no dispute that there was a significant delay. The Applicant suggests that the General Division should have considered whether a limitation period ought to have been applied in this case, such that its original decision should be reinstated.

[16] At this juncture, I have not considered whether the General Division had any authority to provide any remedies to cure the significant delay—apart from its assignment of weight to the evidence—nor whether a limitation period even exists, but I am prepared to grant leave on this ground as well, that the General Division may have failed to consider the

primary issue upon which the Applicant had based his appeal, and might have thereby failed to determine whether it had any remedial jurisdiction.

Evidentiary Issues

[17] The Applicant argues that the General Division should have lowered the burden of proof and not required "absolute proof and all-encompassing (concrete) evidence of the pre-existing common-law relationship." He also contends that the member should have weighed all of the evidence. In fact, it is clear that the member did weigh all of the evidence, when he indicated that he preferred the evidence of the Added Party over that of the Applicant. The burden of proof in civil proceedings is almost always on a balance of probabilities (unless some element of fraud, deceit or bias is involved, in which case the burden is higher) and short of the Applicant providing me with any legal authorities otherwise, I am not satisfied that the appeal has a reasonable chance of success on this ground.

[18] The Applicant further claims that the General Division erred in accepting witness statements made on behalf of the Added Party. The Applicant claims that, as they were merely handwritten, signed statements and not sworn affidavits, the General Division ought not to have ruled that they "were sworn and had sufficient legal authority to be considered reliable." These statements can be found at GT1-84 to 86. Each of the witnesses concluded their statements or letters by writing, "I swear that the above information is true." When the member noted in the evidence section that the witnesses concluded their letters with this statement, he was by no means suggesting that they had been sworn before a commissioner of oaths or notary public.

[19] Proceedings before the General Division are less formal than, say, judicial proceedings, and generally, the strict rules of evidence do not apply to administrative tribunals, unless expressly prescribed. While the General Division is not bound by formal rules of evidence, as the Supreme Court of Canada held in *R. v. Conway*, [2010] 1 SCR 765, members of administrative tribunals should nonetheless exclude information that is irrelevant, unreliable or inaccurate. As the Federal Court determined in *Gil v. Canada (Minister of Citizenship and Immigration*), 1999 CanLII 8407, "In recognition of their expertise in the factual issues with which they deal, administrative tribunals are also

afforded considerable latitude in their assessment of the relevance and probative value of material that is tendered as evidence in their proceedings."

[20] Irrespective of whether statements are sworn, members are entitled to determine their admissibility and the weight to assign to those statements. In this case, the member was mindful that each of the witnesses had a relationship with the Added Party, whether as a friend or as a relative. The member tested the reliability of the given statements, by determining whether they were overall consistent with the preponderance of evidence before him. I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division member ought to have necessarily excluded the witness statements on the basis that they were not sworn affidavits.

Findings of Fact

[21] The Applicant submits that the General Division based its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, in relation to the following:

- addresses that appeared on his academic student records, his passport application, and the Added Party's income tax returns;
- his letter of October 1984 (GT1-96); and
- the assets and expenses of the Applicant and the Added Party.

[22] Generally, the Applicant is arguing that the General Division ignored relevant evidence that disproved the Added Party's evidence and that it "cherry-pick[ed]" evidence that was favourable to the Added Party. As I have indicated above, it is clear from his analysis that the member was mindful of the Applicant's evidence, such as correspondence addressed to the Applicant at the Pacific Avenue residence, but that he simply preferred the Added Party's evidence over that of the Applicant, finding that it was overall more reliable. The General Division also expected that there would have been more supporting documentation and, as it indicated at paragraph 33, ultimately found that the Applicant had

failed to produce any compelling documentation to substantiate the continuous period of common-law cohabitation that he claimed.

[23] Essentially, the Applicant is requesting that the Appeal Division reweigh and reassess the evidence in order to reach a different conclusion regarding the period of cohabitation with the Added Party. However, as the Federal Court held in *Tracey*, it is not the role of the Appeal Division to conduct a reassessment when determining whether leave should be granted or denied, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

[24] Additionally, I am mindful of the words of the Federal Court in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

CONCLUSION

[25] Leave to appeal is granted only in respect of the issues of whether the General Division (1) breached any principles of natural justice and (2) failed to consider the "delay issue." This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division