



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Dr. L. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 279

Tribunal File Number: AD-16-1030

BETWEEN:

Dr. L. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 16, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a Canada Pension Plan (CPP) retirement pension in June 2014 and she began receiving a retirement pension in July 2014. She had turned 60 in March 2014 and had requested that her pension be paid starting in March 2014.

[2] The Respondent advised the Appellant, by letter dated October 16, 2014, that the CPP legislation “specifies that the commencement date of a retirement pension for someone who has reached age 60 but has not reached age 65 will be the month following the month of application.” Therefore, the earliest month that the Appellant’s retirement pension could be paid was July 2014.

[3] The Appellant requested a reconsideration of the Respondent’s decision. The Respondent advised, by letter dated November 24, 2014, that her request for reconsideration had been received and that her file would be reviewed. The Appellant wrote to the Respondent in December 2014 and provided “additional information in support of retroactive payment.” The Respondent replied and advised, by letter dated December 31, 2014, that the initial decision was being maintained. The reconsideration decision stated, among other things, that “[t]here is no retroactivity for individuals who elect to receive their pension under the age of 65.”

[4] The Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal) in February 2015. She requested that the Tribunal allow her appeal because her application requested that the pension start in March 2014, the information that Service Canada provided was inconsistent and the “no retroactivity” provision did not exist on June 5, 2014, when she had applied for a retirement pension.

[5] On May 31, 2016, the General Division summarily dismissed the appeal on the basis that the Appellant “asks the Tribunal to make an exception to the application of the legislated requirements in the CPP” but the “Tribunal does not possess an equitable jurisdiction or discretion to depart from the legislation.”

[6] The Appellant filed documents upon which she had made handwritten comments, specifically, a copy of the July 20, 2016, letter from the Tribunal, acknowledging her July 2016 correspondence. The Appellant dated these documents August 8, 2016, and made notations on them.

[7] The Tribunal treated these documents as an incomplete notice of appeal (NOA) to the Tribunal's Appeal Division. By letter dated August 19, 2016, the Tribunal specified what information was required to complete the NOA.

[8] The Appellant returned a copy of the August 19, 2016, letter to the Tribunal, attaching a May 27, 2016, letter from the Tribunal and certain pages of the General Division decision, with handwritten notations on each of the documents. She dated the documents "Sept 2, 2016" and the Tribunal received them on September 13, 2016. The Tribunal considered the appeal to the Appeal Division complete on September 13, 2016.

[9] The Appellant filed an "Application to Appeal to the Appeal Division" form in November 2016, which the Tribunal received on November 24, 2016.

[10] The Appellant wrote to the Tribunal many more times, by way of handwritten notations on a copy of the Tribunal's earlier correspondence. One of the repeated notations was the correction of her name to "Dr. L. B." in every instance of the use of the Appellant's name (such as the envelope label, the subject line and the c.c. line).

[11] After reviewing the documents that the Appellant filed and the notations contained therein, I summarize the Appellant's reasons for appeal as follows:

- a) She filed an application for a CPP retirement pension on June 5, 2014. The application asked "When do you want your pension to start?" and she wrote "2014 Mar 5th." The word "retroactive" was not in the application document.
- b) The application gave her a choice of start date, and she made the correct choice.
- c) The General Division notified her that it was considering summarily dismissing her appeal, and she replied "do not dismiss summarily."

- d) The General Division decision, under the heading “The Law” states: “[Subsection] 60(1) of the CPP says that no benefit under the CPP is payable to any person unless an application has been made by him, or on his behalf, and payment of the benefit has been approved under the Act.” This is an error because it is “missing female reference.” As a result, “equality is missing” in paragraph 17.
- e) The General Division stated that the issue is “Whether the Appellant is entitled to receive a CPP retirement pension retroactive to reaching 60 years of age [...].” This is an error. The application did not have the word “retroactive” in it.

[12] The Respondent did not file submissions before the Appeal Division. Its submissions before the General Division are in the appeal record, and include the following arguments:

- a) The Respondent explained in its letters of October and November 2014 that the earliest that the Appellant was entitled to a CPP retirement pension was July 2014.
- b) The Appellant’s letter to the Respondent, dated October 31, 2014, asked for the word “retroactive” to be included in her reconsideration request.
- c) For retirement pensions commencing on or after January 2, 2012, there is no retroactivity for individuals who elect to receive their pension under the age of 65: see CPP, paragraph 67(3.1)(b).
- d) The Appellant was 60 years and 3 months of age when she submitted her application for a retirement pension on June 25, 2014.
- e) The earliest commencement date was the month following the month in which the application had been received, namely, July 2014.

[13] This appeal proceeded on the basis of the record for the following reasons:

- a) the fact that the Appeal Division member had determined that no further hearing was required; and

- b) the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

ISSUE

[14] The Appeal Division must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division or confirm, reverse or modify the General Division's decision.

LAW AND ANALYSIS

[15] The Appellant is appealing a decision dated July 7, 2016, whereby the General Division summarily dismissed her appeal on the basis that it was satisfied that the appeal did not have a reasonable chance of success.

[16] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESD Act), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Because no further hearing is required, this appeal before the Appeal Division is proceeding pursuant to paragraph 37(a) of the *Social Security Tribunal Regulations*.

[17] Subsection 58(1) of the DESD Act sets out the grounds of appeal as follows:

- 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.

[18] The relevant provisions are paragraph 44(1)(a), subsection 60(1) and paragraph 67(3.1)(b) of the CPP.

Legal Test for Summary Dismissal

[19] Subsection 53(1) of the DESD Act allows the General Division to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[20] Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or it may confirm, rescind or vary the General Division's decision in whole or in part.

[21] Here, the General Division correctly stated the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraph 3 of its decision.

[22] However, it is insufficient to simply cite the wording related to a summary dismissal set out in subsection 53(1) of the DESD Act without properly applying it. After identifying the legislative basis, the General Division must correctly identify the legal test and apply the law to the facts.

[23] At paragraph 2 of its decision, the General Division asked "whether the appeal should be summarily dismissed."

[24] The General Division decision does not state what legal test it applied to arrive at its conclusion to summarily dismiss the appeal.

The General Division's Decision

[25] While the General Division did not state the legal test it applied, it did explain the basis upon which it had summarily dismissed the appeal:

[10] The Appellant's was born March 5, 1954, and reached 60 years of age on March 5, 2014.

[11] The Appellant's application for a retirement pension was received in June 5, 2014, and she commenced receiving a retirement pension in July 2014.

[...]

[14] The Tribunal is created by legislation and, as such it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the CPP.

[15] In compliance with section 22 of the Social Security Tribunal Regulations, the Appellant was given notice in writing of the intent to summarily dismiss the appeal and was allowed to a reasonable period of time to make submissions.

[16] To receive a CPP retirement pension a person must meet all eligibility requirements as set out in the CPP. In accordance with paragraph 67(3.1)(c) the Appellant properly commenced receiving a retirement pension in July 2014.

[17] The Appellant asks for the Tribunal to make an exception to the application of the legislated requirements in the CPP, but the Tribunal is required to apply the CPP legislation to all Appellants equally, and is prevented from making exceptions. The Tribunal does not possess an equitable jurisdiction or discretion to depart from the legislation.

[18] Accordingly, the Tribunal finds that the appeal has no reasonable chance of success.

[26] Because the General Division member did not identify the legal test applicable to a summary dismissal and did not apply that legal test to the facts, the General Division decision is based on an error of law.

[27] The legal test applicable to a summary dismissal is the first question that needs to be answered. The question of whether there was an error in law (or another type of error) in the Respondent's decision on the specific issues would follow.

[28] Given the General Division's error of law on the preliminary question of the legal test applicable to summary dismissals, the Appeal Division is required to conduct its own analysis and decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division or confirm, reverse or modify

the decision: *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, at paragraph 8, and subsection 59(1) of the DESD Act.

Application of Legal Test for Summary Dismissal

[29] Although the General Division erred by neither identifying nor applying the applicable legal test, paragraphs 10, 11, and 14 to 17 of the General Division decision are correct, and I agree with the findings stated therein.

[30] The Appellant takes issue with paragraphs 6, 13, 17 and 18 of the General Division decision. Those paragraphs read as follows:

[6] Paragraph 60(1) of the CPP says that no benefit under the CPP is payable to any person unless an application has been made by him, or on his behalf, and payment of the benefit has been approved under the Act.

[13] The Appellant asks for the Tribunal to use discretion to allow an exception to increase the legislated retroactivity of commencement of payment of a retirement pension upon reaching 60 years of age.

[17] The Appellant asks for the Tribunal to make an exception to the application of the legislated requirements in the CPP, but the Tribunal is required to apply the CPP legislation to all Appellants equally, and is prevented from making exceptions. The Tribunal does not possess an equitable jurisdiction or discretion to depart from the legislation.

[18] Accordingly, the Tribunal finds that the appeal has no reasonable chance of success.

[31] Although “no reasonable chance of success” was not further defined in the DESD Act, for the purposes of the interpretation of subsection 53(1) of the DESD Act, it is a concept that has been used in other areas of law and that has been the subject of previous Appeal Division decisions.

[32] There appear to be three lines of cases in previous Appeal Division decisions that deal with appeals of summary dismissals by the General Division, namely:

- a) *J. S. v. Canada Employment Insurance Commission*, 2015 SSTAD 715; *C. D. v. Canada Employment Insurance Commission*, 2015 SSTAD 594; *M. C. v. Canada Employment Insurance Commission*, 2015 SSTAD 237; and *J. C. v. Minister of Employment and Social Development*, 2015 SSTAD 596. The following legal test was applied: 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? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin c. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.
- b) AD-15-236 (*C. S. v. Minister of Employment and Social Development*, 2015 SSTAD 974); AD-15-297 (*A. P. v. Minister of Employment and Social Development*, 2015 SSTAD 973); and AD-15-401 (*A. A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178). In these decisions, the Appeal Division applied a differently articulated legal test: whether there is a “triable issue” and whether there is any merit to the claim using the language of “utterly hopeless” and “weak” case in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not “manifestly clear,” then the matter would be inappropriate for a summary dismissal. A weak case would not be appropriate for a summary dismissal, as it necessarily involves assessing the merits of the case, examining the evidence and assigning weight to it.
- c) AD-15-216 (*K. B. v. Minister of Employment and Social Development*, 2015 SSTAD 929). In this decision, beyond citing subsection 53(1) of the DESD Act, the Appeal Division did not articulate a legal test.

[33] I find that the application of the two tests cited in paragraphs 32 a) and b) of this decision leads to the same result in the present case—the appeal has no reasonable chance of success. It is 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. It is also clear that this is not a “weak” case but rather an “utterly hopeless” one, as it does not involve assessing the merits of the case or examining the evidence.

[34] Neither the Tribunal's General Division nor its Appeal Division can vary the legislative provisions of the CPP.

[35] According to subsection 44(1) of the CPP, a retirement pension shall be paid to a contributor who has reached 60 years of age subject to Part II of the CPP (emphasis added). Part II of the CPP relates to pensions and supplementary benefits and includes sections 42 to 90.

[36] Subsection 60(1) of the CPP states: "No benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act."

[37] Subsection 67(3.1) states:

For a retirement pension that commences to be payable on or after January 1, 2012 and if the applicant is not an estate, subject to section 62, if payment of the retirement pension is approved, the pension is payable for each month commencing with the latest of

(a) the month in which the applicant reached sixty years of age,

(b) the month following the month in which the application was received if they were under sixty-five years of age when they applied,

(c) the eleventh month preceding the month in which the application was received if they have reached sixty-five years of age when they applied, but in no case earlier than the month in which they reached sixty-five years of age, and

(d) the month chosen by the applicant in their application.

[38] The Appellant's main argument is that she chose March 2014 (the month she turned 60) as the date of commencement of her pension. A copy of the application she filed confirms that this was her choice.

[39] However, subsection 67(3.1) of the CPP states that a retirement pension is payable commencing with the latest of the situations described in paragraphs (a) to (d). As applied to the Appellant, paragraphs (a) and (d) are March 2014, paragraph (b) is July 2014 and paragraph (c) does not apply. Therefore, the latest of these is July 2014, and the Appellant's pension is payable for each month commencing in July 2014.

[40] The application form to request a CPP retirement pension does not change the legislative provisions and does not provide an exception to them.

[41] The Appellant notes that the CPP retirement pension application form does not include the word “retroactive.” Again, the application form does not change the legislative provisions. Despite admonishing the Respondent and the General Division for using the words “retroactive” and “retroactivity,” the Appellant herself used the word “retroactive.” She wrote, in correspondence to the Respondent in August and October 2014, “retroactive amount requested” and “please use the key word ‘retroactive’ in this.”

[42] The Appellant also argues that there are errors in the General Division decision because paragraph 6 is “missing female reference” and “equality is missing” in paragraph 17. I find that there is no merit to these arguments.

[43] Paragraph 6 recites subsection 60(1) of the CPP. Paragraph 17 states that “[t]he Tribunal is required to apply the CPP legislation to all appellants equally, and is prevented from making exceptions.” These statements do not contain an error of law or erroneous findings of fact.

[44] As to the suggestion that the words “by him or on his behalf” in subsection 60(1) of the CPP and “missing female reference” means that “equality is missing,” I note that masculine pronouns are commonly used in the English language to signify “he or she.” The *Interpretation Act* provides that references to female persons include male persons and vice versa. Subsection 33(1) of the *Interpretation Act* reads: “Words importing female persons include male persons and corporations and words importing male persons include female persons and corporations.”

[45] Subsection 3(1) of the *Interpretation Act* states: “Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.” The *Interpretation Act* applies to the CPP.

[46] After reviewing the Appellant’s notice of appeal, submissions and correspondence, the General Division’s record and decision, the Appeal Division’s previous decisions relating to summary dismissals, and after applying the legal test applicable to a summary dismissal, I hereby dismiss the appeal.

CONCLUSION

[47] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division