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

Citation: *L. V. v. Minister of Employment and Social Development*, 2017 SSTADIS 704

Tribunal File Number: AD-17-400

BETWEEN:

L. V.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: December 4, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant was born in Ukraine. She resided there, then in Israel. In January 2000 she immigrated to Canada with her husband and children. She did not work outside the home consistently after coming to Canada. The Applicant and her husband divorced in 2009. The Applicant applied for a Canada Pension Plan (CPP) retirement pension and an Old Age Security pension (OAS pension) in May 2012. She turned 60 in 2013 and the Respondent approved a retirement pension to begin after her 60th birthday. The Respondent denied her application for an OAS pension. The Applicant requested reconsideration in both matters, seeking an increase in the amount of retirement pension payable on account of income earned in Ukraine and Israel, and a credit split upon the end of her marriage, and again seeking an OAS pension. The Respondent maintained its decisions on reconsideration.

[2] The Applicant appealed to the Social Security Tribunal of Canada (Tribunal). In her appeal, the Applicant also wished to argue that her rights under the *Canadian Charter of Rights and Freedoms* (Charter) had been breached. On March 31, 2017, the Tribunal's General Division decided that the Charter claims would not proceed as the Applicant had not served and filed a Notice of Constitutional Question (NCQ) as required by the *Federal Courts Act* and the *Social Security Tribunal Regulations*. It dismissed her claims regarding the retirement and OAS pensions in separate decisions. The Applicant filed two applications for leave to appeal (Application) with the Tribunal's Appeal Division on May 18, 2017. On November 27, 2017, I joined the appeals.

ANALYSIS

[3] The *Department of Employment and Social Development Act* (DESD Act) governs the operation of this Tribunal. According to subsections 56(1) and 58(3) of the DESD Act, an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[4] The only grounds of appeal available under the DESD Act are set out in subsection 58(1) of the DESD Act. They are that the General Division failed to observe the principles of

natural justice, made an error of law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it. Subsection 58(2) states that leave to appeal is to be refused if the appeal has no reasonable chance of success.

[5] The Applicant argues that the General Division failed to observe the principles of natural justice, erred in law and based its decision on erroneous findings of fact contrary to the DESD Act. I must decide whether the Applicant has raised a ground of appeal under subsection 58(1) of the DESD Act that has a reasonable chance of success on appeal.

Natural Justice

[6] The principles of natural justice are concerned with ensuring that each party to an appeal has an opportunity to present their case, to know and meet the case against them, and to have a decision made by an impartial decision-maker based on the law and the facts.

[7] First, the Applicant argues that the General Division failed to observe the principles of natural justice because it did not offer her the services of duty counsel or inform her of the availability of legal assistance. The Tribunal is impartial, and cannot provide legal advice to any party who appears before it. It has no obligation to provide assistance or direction to any party to obtain legal advice or representation. This argument does not point to any error made by the General Division.

[8] The Applicant also argues that the General Division failed to honour the principles of natural justice because it did not permit her to respond to the Respondent's request for an adjournment of the hearing before it. The hearing in this matter was originally set for two days in December 2016. When it became apparent that the Applicant had not filed proof of service of the NCQ on the Attorneys General of Canada and all of the provinces, the General Division member adjourned the hearing to afford the Applicant further opportunity to do so, as without this the Charter claims could not proceed. The matter was adjourned to March 2017. As the Applicant had still not filed this proof of service, the General Division cancelled the hearing and decided the appeal on the basis of the written materials filed.

[9] When the appeal was adjourned in December, it was done without a request from either party. It was in the Applicant's legal interest to do so, as without proof of service of the NCQ

on the attorneys general her Charter claims could not proceed. The Applicant's legal rights were not interfered with by this.

[10] Regarding the March hearing date, the General Division clearly indicated to the Applicant in advance of this date what was required of her and that if she did not comply with the service requirements her Charter claim would not proceed. The Respondent did not request any adjournment of the hearing. The Applicant's argument that not permitting her to respond to the Respondent's request for an adjournment failed to observe the principles of natural justice is not a ground of appeal that has a reasonable chance of success on appeal.

[11] The fact that the hearing dates were changed and cancelled just before each was to occur also does not point to any failure to observe the principles of natural justice. On the contrary, it points to the Tribunal giving the Applicant every opportunity to comply with the requirements to pursue her Charter claims.

[12] Further, the Applicant argues that the principles of natural justice were breached because it took four years until her claims were decided by the General Division. It is unfortunate that her claims were not resolved in a more timely manner. Paragraph 6 of the General Division decision in GP-13-1432 acknowledges that this matter took a long time to be resolved. The appeal was caught up in a large backlog of cases transferred from the Office of the Commissioner of Review Tribunals to this Tribunal, and it was not assigned to a member for 20 months after this Tribunal began its mandate. Although this is an unfortunate circumstance, it does not point to any failure to observe the principles of natural justice.

[13] The Applicant also contends that the General Division was biased for various reasons. I am not satisfied that these allegations are grounds of appeal under the DESD Act that have a reasonable chance of success for the following reasons.

[14] First, the Applicant contends that the Tribunal was biased as it is not independent of the executive branch (ministry). The Social Security Tribunal is an independent quasi-judicial tribunal, and the Minister of Employment and Social Development is a party who appears before it. There is no indication in the written record or the General Division decision that any party was not treated impartially.

[15] Second, the Applicant argues that there was a suspicion of bias because the December hearing dates were adjourned on short notice. The decisions clearly set out that the Applicant was told of the requirements to proceed with a Charter claim and given more than one opportunity to comply with them. The December hearing dates were adjourned to afford the Applicant another opportunity to do this. The appeal was adjourned by the Tribunal, not at the request of either party. No indication of bias is evident from this.

[16] Further, the Applicant argues that the General Division had no intention of holding an oral hearing as it made the decision on March 31, just after the last days that were set for a hearing, and that it was cancelled without an opportunity for objection by the Applicant. The decisions set out in exhaustive detail all of the efforts that the Tribunal made to ensure that the Applicant knew what was required of her to pursue her Charter claims, and all the steps taken, including adjourning the hearing, to allow her to do so. The Tribunal is not required to afford each applicant an oral hearing. The Applicant does not suggest that she did not know the case that she had to meet, or what evidence regarding her case she could not present. She provides no detail from which I can understand how the Tribunal could have been biased in proceeding in this way. This ground of appeal does not have a reasonable chance of success on appeal.

[17] In addition, the Applicant submits that the General Division was biased because it did not consider documents she submitted after the decision had been rendered. The General Division's mandate is completed once a decision is rendered. It cannot be faulted for not considering documents filed after the end of its mandate.

[18] The Applicant also argues that she had legitimate expectations of procedures that would be followed, and that the Tribunal's conduct with regard to the procedure of service of documents gives rise to a suspicion of bias. In particular, she argues that the procedure for service of documents is not clear, the form for affidavit of service is missing, the Tribunal did not inform her why her affidavit of service was not accepted, the Tribunal did not advise the attorneys general of a change of hearing date, the requirement to provide proof of receipt of the documents was unreasonable, there was a contradiction in the decision regarding whether proof of service had been provided, and there was no basis to demand that she re-serve the attorneys general.

[19] The General Division decisions clearly set out what was required of the Applicant regarding service of the NCQ on the attorneys general. While a specific form to establish that service was affected was not provided to her, there is no dispute that something was required, which the Applicant must have understood as she provided an unsigned document for this purpose. The Tribunal is not obliged to advise the attorneys general of any hearing dates or any change to those dates; it is for the party pursuing a Charter challenge to do this as part of their case. In order for the attorneys general to be able to decide whether they will participate in the hearing, it is necessary that they know of any changes in the hearing date. There was no contradiction in the decision regarding the NCQ. Paragraphs 12 to 24 of the General Division decision refer to the NCQ and what was required for the December hearing dates. Paragraph 35 refers to the March hearing dates, and the fact that there was no indication that the NCQ had been served prior to these hearing dates. Consequently, I am satisfied that these arguments do not point to any bias by the General Division and are not a ground of appeal that have a reasonable chance of success on appeal.

[20] In addition, the Applicant submits that the decision was not made in an impartial manner. She argues that the General Division refused to hear her. However, she was given numerous opportunities to comply with the filing requirements and failed to do so. She does not now indicate any evidence that she was not able to present. In addition, the General Division is not required to hold an oral hearing in every case.

[21] The Applicant also disagrees with the decision made. This is not sufficient to establish that the General Division was biased.

[22] Additionally, the Applicant argues that the General Division simply adopted the Respondent's position to dismiss her claim and did not consider the lawfulness of various CPP provisions. Upon reading the decision, it is clear that the General Division dismissed the Charter claims because the Applicant did not comply with service requirements, not on the merits of any substantive arguments. This was done after a full consideration of the relevant facts, and after the Applicant had been given a number of opportunities to comply. The fact that the decision mirrors the Respondent's submission is insufficient to point to the General Division being biased.

[23] The Applicant further alleges bias because the General Division did not consider the issue of the inclusion of international earnings. However, paragraphs 71 to 73 of the decision in file number GD-13-1432 specifically addressed that Canada may enter into agreements with other countries regarding social benefits, but that it had not done so Ukraine or Israel. As such, her claim for credit for these earnings toward her retirement pension was dismissed. This ground of appeal does not point to any bias or any error by the General Division.

Errors in Law

[24] The Applicant further argues that the General Division erred in law. She contends that the General Division decision not to reference the Charter and the *Universal Declaration of Human Rights* is inconsistent with the principles set out in *Baker v. Canada* [1999] 2 SCR 817. This decision stands for the principle that parties are owed a duty of fairness when involved in litigation, and that the actual requirements for fairness may change depending on a number of factors specific to the case and the tribunal before which the parties are to appear. In this case, the General Division clearly set out that the Tribunal, as a creature of statute, only has the authority granted to it by statute. The Tribunal cannot deal with claims made under the *Universal Declaration of Human Rights*. It cannot deal with Charter claims unless the NCQ has been properly served. This argument does not point to any error of law.

[25] Next in this regard, the Applicant argues that the General Division erred in law as it did not consider inconsistencies between two provisions of the CPP, or an alleged deficiency as the CPP does not specify who a “pensioner” is, and it did not consider whether a province has some authority over federal programs such as CPP and OAS. The issues to be decided by the General Division were whether the Applicant was entitled to a greater retirement pension payment and whether she was entitled to an OAS pension. To decide these matters in this case, it was not necessary for the General Division to analyze the arguments raised as grounds of appeal. The General Division decisions set out the evidence that was presented on the issues at hand, it applied the law to these issues and made a decision that was intelligible, logical, and based on the law and the facts. The raising of these grounds of appeal does not point to any error in law made by the General Division.

[26] Finally, in this regard, the Applicant argues that the General Division had no authority in law to cancel the hearing because the NCQ was not properly served. The General Division decisions set out clearly why the March hearing dates were cancelled and the legal basis on which it was done. This argument does not point to any error in law.

Erroneous Findings of Fact

[27] The Applicant also contends that the General Division based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material that was before it. First, in this regard she contends that the General Division failed to accept the fact that the NCQ was served, and in a perverse way adjourned and cancelled the hearing. The evidentiary basis for the finding of fact that the NCQ was not properly served is clearly set out in the decision. This argument does not point to any error made contrary to the DESD Act.

[28] The Applicant next contends that the General Division disregarded that she had to access the retirement pension before she reached 65 years of age, that she was penalized for doing so, that the General Division failed to acknowledge her work outside Canada, her dual citizenship with Ukraine, and that the requirement of 40 years of contributions is not designed for immigrants. The General Division decision sets out the Applicant's work and residential history. The Applicant does not suggest that any error was made in doing so, or that any important evidence was overlooked. I am not satisfied that the decision was based on any erroneous finding of fact regarding these matters contrary to section 58 of the DESD Act.

[29] I have also reviewed the General Division decisions and the written record. I am satisfied that the General Division did not overlook or misconstrue any important evidence.

CONCLUSION

[30] The Application is refused as the Applicant has not presented a ground of appeal under subsection 58(1) of the DESD Act that has a reasonable chance of success on appeal.

Valerie Hazlett Parker
Member, Appeal Division