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

Citation: *S. M. v. Minister of Employment and Social Development,* 2017 SSTADIS 690

Tribunal File Number: AD-17-111

BETWEEN:

S. M.

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: November 29, 2017

Canada

DECISION AND REASONS

DECISION

[1] The application requesting leave to appeal is refused.

OVERVIEW

[2] The Applicant, S. M., and her children suffered years of abuse at the hands of her former spouse, O. B. The Applicant and her spouse divorced on May 30, 1999. Approximately two weeks later, he passed away. She applied for a Canada Pension Plan orphan's benefit on behalf of her child, R. B. ("RB"), and, as of July 2009, she began receiving an orphan's benefit on his behalf.

[3] However, the Applicant determined that RB would be safer living apart from his family, given the history of abuse. In 2011, she formally assigned permanent care and custody of RB to foster care. She also maintained a second residence to enable her to spend time with RB and to provide him with a safe environment.

[4] The Respondent subsequently determined that the Applicant had not had custody and control of RB as of October 2009 — when RB was taken into care with the Province of British Columbia — and that she was therefore disentitled to the orphan's benefit as of October 2009, resulting in an overpayment of approximately $3,660. She appealed the Respondent's decision.

[5] The General Division concluded that it lacked any jurisdiction or discretion to relax the legislative provisions of the *Canada Pension Plan* and decide (the issue of entitlement to an orphan's benefit) in her favour, despite the unfortunate circumstances that led to the Applicant's divorce and to having to place RB in foster care, and the Applicant's impecuniosity. The Applicant now seeks leave to appeal the General Division's decision, on the grounds that the General Division erred in law and failed to observe a principle of natural justice. I must consider whether the appeal has a reasonable chance of success on either of these grounds.

ISSUE

[6] The issue before me is whether the appeal has a reasonable chance of success on the basis that the General Division either erred in law or failed to observe a principle of natural justice.

GROUNDS OF APPEAL

[7] 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.

[8] Before leave to appeal can be granted, 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 of Canada endorsed this approach in *Tracey.*[1]

ANALYSIS

Did the General Division fail to observe a principle of natural justice?

[9] No. The General Division did not fail to observe a principle of natural justice, for the reasons that follow.

[10] Natural justice is concerned with ensuring that the process is fair and that the parties have each had a full and fair hearing and the opportunity to present their respective cases.

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[1] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[11] The Applicant alleges that she did not receive a fair hearing because the General Division member (1) failed to disclose her qualifications, (2) failed to provide her with an in-person hearing, and (3) failed to provide her with the Respondent's written submissions in a timely manner.

Qualifications of member

[12] I have listened to the recording of the hearing before the General Division. The Applicant expressed curiosity regarding the member's training and background (approximately 8:00 minute mark of the audio recording). The General Division declined to respond to the Applicant's question regarding her qualifications, on the basis that it was irrelevant to the proceedings. The Applicant noted that the member stated that the "folks at the Social Security Tribunal think that [she is] qualified."

[13] The Applicant argues that she is entitled to know members' qualifications, but I find that nothing turns on this point. The member was correct to point out that the subject of her qualifications was wholly irrelevant to the issues.

[14] In any event, the qualifications of all members of the Social Security Tribunal are publicly available. The Government of Canada announces members' appointments, along with their biographical information, by way of press release.

Form of hearing

[15] The Applicant claims that she was entitled to an in-person hearing, as this would have provided her with "an opportunity to address the individuals who are making decisions about me and my life in person."

[16] I note that the Applicant does not appear to have objected to the form of hearing until after the General Decision rendered its decision. In the Hearing Information Form (GD5), she did not suggest that she was unable to participate in a teleconference, or, for that matter, any other form of hearing, including written questions and answers.

[17] In *Murphy*,[2] the matter proceeded without a hearing. The General Division in that case determined that a review of the documentary file was sufficient to render a decision because it had determined that the issues under appeal were not complex, that there were no gaps in the information in the file and that there was no need for clarification, that credibility was not a prevailing issue and that the form of hearing respected the requirement under the *Social Security Tribunal Regulations* (Regulations) to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[18] The Federal Court doubted that a proper assessment of the severity of Ms. Murphy's disability could have taken place without an oral hearing, given her limited education, her limited ability to make written representations, her speech impediment and her difficulty in expressing her thoughts. The Court found that the General Division had deprived Ms. Murphy of a hearing.

[19] In *Robbins*,[3] the Federal Court of Appeal also addressed whether it was procedurally unfair when the Appeal Division decided the matter on the basis of written materials only. After examining the nature of the issues, the evidence and the circumstances of the case, the Federal Court of Appeal rejected any submission that the Appeal Division had committed procedural unfairness. It recognized that the Appeal Division is entitled to decide matters without any hearing at all, under section 43 of the Regulations. It wrote that it was "entitled to some leeway […] in part because its choice is often based upon its appreciation of the issues, the evidence before it and the circumstances of the case […]"

[20] The Federal Court of Appeal examined whether the Appeal Division had ultimately provided Mr. Robbins with a full opportunity to offer evidence and make submissions, and whether an oral hearing would have changed the result. Mr. Robbins conceded that he would have largely reiterated what was in the written material.

[21] Although *Robbins* was in the context of an appeal before the Appeal Division, the same considerations apply in the matter before me, though the primary considerations are whether, in the circumstances of this case, the Applicant had a full opportunity to offer and

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[2] *Murphy v. Canada (Attorney General)*, 2016 FC 1208.
[3] *Robbins v. Canada (Attorney General)*, 2017 FCA 24.

make submissions and whether an in-person hearing or a videoconference hearing, as opposed to a teleconference hearing, would have changed the result. Apart perhaps from the timeliness of receiving the Respondent's submissions (which I will review below), the Applicant has not otherwise suggested that she was unable to make submissions or present her case during the teleconference hearing before the General Division.

[22] The Applicant argues that she is entitled to her "day in court" but, as the Federal Court of Appeal held in *Robbins*, the Regulations do provide some leeway and discretion to determine the form of hearing. In short, there is no absolute right to an in-person hearing.

[23] Given the nature of the issues involved and the fact that the evidence was uncontested, the Applicant has not convinced me that an in-person hearing or a videoconference hearing would have necessarily changed the outcome, or that she was deprived of a full opportunity to present her case and to make submissions. For these reasons, I would defer to the General Division in its decision regarding the form of hearing.

<u>Timeliness of producing the Respondent's written submissions</u>

[24] The Applicant received the Respondent's written submissions (GD6) following the hearing. She acknowledges that the General Division permitted her to address the Respondent's submissions in writing but claims that this did not allow for "much discussion during the hearing." She claims that the General Division did not permit her to address the points raised in the submissions "in any depth nor engage in any discussion of the points that would be raised had [she] had the opportunity to review them, process the information and consult outside parties for support," essentially depriving her of her "day in court."

[25] The Respondent's submissions addressed the issue of whether it had correctly cancelled the orphan's benefit. The Respondent reviewed the facts and argued that the Applicant was no longer eligible to receive the orphan's benefit after October 2009 under subsection 76(2) of the *Canada Pension Plan.* The Respondent also argued that the *Canada Pension Plan* did not permit the granting of an orphan's benefit on the basis of financial need.

[26] The Applicant filed a response, indicating that she "[stood] by the information and request" and that further documentation was unavailable as it was in storage, although she did not identify that "further information," or how it might have impacted the proceedings.

[27] The Applicant does not now suggest that her submissions or position would have differed, had she received the Respondent's submissions (GD6) prior to the hearing before the General Division.

[28] Given that the General Division had provided her with an opportunity to make any additional arguments, and that the Applicant has not otherwise indicated how her response would have differed had she received the Respondent's submissions prior to the hearing, she has not satisfied me that the General Division deprived her of an opportunity to respond to the Respondent's submissions (GD6).

<u>Did the General Division err in law?</u>

[29] The Applicant asserts that the General Division erred in law by failing to consider that, although she was divorced from her spouse, she continued to act as a spouse up to and following his death. In her previous submissions to the General Division, for instance, she noted that she and her family cleaned her spouse's home after he passed away, and that she also assumed his financial obligations.

[30] The Applicant maintains that the definition of a survivor under the *Canada Pension Plan* should encompass someone of her profile, who has survived tragic family circumstances. However, as these factors do not address the issue of the care and custody of the child, these submissions are not germane as to whether the Applicant was entitled to an orphan's benefit on behalf of RB after October 2009.

[31] The *Canada Pension Plan* sets out who is entitled to an orphan's benefit and when such a benefit ceases to be payable. Subsection 76(2) of the *Canada Pension Plan* stipulates that an orphan's benefit ceases to be payable with the payment for the month in which the child ceases to be a dependent child or dies.

[32] The Applicant does not dispute that RB ceased to be a dependent child in October 2009. Subsection 76(2) of the *Canada Pension Plan* therefore applies. The Applicant has not convinced me that the General Division erred in its application of the subsection.

[33] Irrespective of how dire the Applicant's circumstances were, there is no discretion or any authority to deviate from the requirements of the *Canada Pension Plan*. I am not satisfied that the appeal has a reasonable chance of success on this issue.

CONCLUSION

[34] Given the foregoing reasons, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division