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

Citation: *I. Q. v. Minister of Employment and Social Development*, 2017 SSTADIS 743

Tribunal File Number: AD-17-504

BETWEEN:

I. Q.

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: December 18, 2017

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, I. Q., receives a Canada Pension Plan retirement pension. However, he argues that the amount of his monthly retirement pension is incorrect. While he agrees that the monthly amount is calculated based, in part, on the length of his contributory period to the Canada Pension Plan, he claims that his contributory period is much shorter than what the Respondent, the Minister of Employment and Social Development, calculates.

[3] The Applicant appealed the Respondent's determination of his monthly retirement pension to the General Division, but it dismissed his appeal. The Applicant now seeks leave to appeal the General Division's decision, on two grounds. The root of his submissions is that the General Division failed to exclude or drop certain periods from his contributory period. He claims that if the General Division had excluded additional months from his contributory period, this would have resulted in an increase in the amount of his monthly retirement pension. I must now consider whether the appeal has a reasonable chance of success.

ISSUE

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

GROUNDS OF APPEAL

[5] 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.

[6] Before leave 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?

[7] Natural justice is concerned with ensuring that an applicant has a fair opportunity to present his or her case, and that the proceedings are fair and free of any bias. Here, the Applicant submits that the General Division deprived him of the opportunity to fully present his case, either when it proceeded to review his case without a hearing (i.e. in-person, videoconference or teleconference hearing), or when it failed to ensure that he had responded to its questions.

[8] I note, however, that the Applicant had requested that the appeal before the General Division should proceed "in writing based on current records and [the Applicant's] new submissions" (GD8-8). In a letter dated October 27, 2016, the Applicant confirmed his request for a "written hearing" (GD9-1). Given the Applicant's requests in this regard, and the fact that the General Division has some discretionary authority in choosing the form of hearing, I find no basis to find that the General Division failed to observe a principle of

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

natural justice when it did not schedule a hearing of the appeal and instead resorted to proceeding on the basis of "questions and answers" and on the written record.

[9] I turn now to the issue of whether the General Division might have otherwise deprived the Applicant of a fair opportunity to fully present his case.

[10] The Applicant argues that he should be able to rely on the child rearing dropout (CRDO) provisions under paragraph 49(*d*) of the *Canada Pension Plan*. He has four children:

Name	**Date of Birth**
A.	September 30, 1971
F.	January 10, 1977
S.	November 25, 1982
M.	March 23, 1985

[11] The CRDO provisions are designed to protect the primary caregiver who stays home to raise a child under the age of seven and who has low or no earnings." Contributors might be able to "drop out" low-earnings periods from the contributory period. The CRDO provisions allow any month to be excluded from the contributory period where the contributor is a family allowance recipient in a year for which his or her unadjusted pensionable earnings are equal to or less than the basic exemption for the year. The Applicant's former spouse, who had received the family allowance, waived her rights to the child rearing provision (GD1B-2/GD2-103).

[12] The application requesting leave to appeal suggests that the Applicant is seeking to exclude only the months when he was reportedly caring for his two youngest children, although in his appeal before the General Division, he also sought to exclude the months when he was reportedly caring for his two eldest children.

[13] The Applicant's record of earnings shows that he had the following pensionable earnings from 1971 to 1979 and from 1989 to 1992:

YEAR	**YOUR PENSIONABLE EARNINGS**	**AMOUNT OF YEARLY BASIC EXEMPTION**
1975	$0	$700
1976	$0	$800
1977	$0	$900
1978	$0	$1,000
1979	$0	$1,100
1989	$13,427	$2,700
1990	$28,900	$2,800
1991	$30,500	$3,000
1992	$32,200	$3,200

[14] Other than the years 1975 to 1979, the Applicant's pensionable earnings exceeded the yearly basic exemption. Because his unadjusted pensionable earnings are greater than the basic exemption for the year, the Applicant therefore cannot rely on the CRDO provisions to exclude the years 1989 to 1992 from his contributory period, under paragraph 49(*d*) of the *Canada Pension Plan.*

[15] For this same reason, it is irrelevant that the Respondent had suggested that it would review the Applicant's request to apply the CRDO provisions in respect of his two youngest children.

[16] On January 17, 2017, the General Division requested additional information from each of the parties, indicating in the Applicant's case that the requested information was essential to determining whether the Applicant could rely on the CRDO provisions.

[17] The General Division's January 2017 letter noted that the Applicant had claimed that he was the primary caregiver for his two eldest children during the years 1975 to 1979 (GD1B-1). The General Division requested the following information and supporting documentation from the Applicant, in respect of these two children:

- list of dates when the Applicant was the primary caregiver for his children;
- description of those who resided in the home;
- whether there was another caregiver in the home;
- status of marriage and location of children's mother;
- explanation as to how the Applicant was able to care for the children, given that he was receiving workers' compensation benefits for all or part of the time period from 1975 to 1979; and
- nature of accommodations, e.g. home, apartment, etc.

[18] The General Division requested similar information in respect of the Applicant's two youngest children, given that the Applicant had also reported that he was their primary caregiver between 1989 and 1992. However, these particular requests were unnecessary given that the Applicant's pensionable earnings from 1989 to 1992 exceeded the amount of the yearly basic exemption.

[19] The General Division sought details regarding the Applicant's employment and schooling between 1989 and 1992. The General Division also queried how the Applicant was able to assume primary caregiving duties if he was either working or schooling. Presumably this same question applied for the years 1975 to 1979, as the Applicant also attended school (allegedly by correspondence) within this period.

[20] The General Division had expected the Applicant to respond to its January 2017 letter and to address the question of how he could have been the primary caregiver if he had been schooling and collecting workers' compensation benefits.

[21] The Applicant suggests that, as he never received the General Division's requests set out in its January 2017 letter and because the General Division rendered a decision "on the record" without a hearing, he was thereby deprived of the opportunity to fully and fairly present his case, particularly in regard to the issue of whether the CRDO applied.

[22] The Applicant indicates that he would have readily provided responses, if he had received the January 2017 letter from the General Division. However, he claims that he had notified the General Division as early as October 2016 that he would be unavailable between November 25, 2016 and March 2, 2017 and that he requested a hearing "after March 2, 2016 [*sic*] (GD9-1)". The Applicant's letter, however, does not expressly state that he would be out of the country.

[23] Even if he had received the January 2017 letter from the General Division, the Applicant argues that the General Division should not have expected any response from him, given that it was aware that he was unavailable between November 25, 2016 and March 2, 2017.

[24] Despite arguing that he would have readily provided responses to the General Division's January 2017 letter, the Applicant has yet to fully indicate the months and years when he was the primary caregiver for his two eldest children, explain how he could have been the primary caregiver when he was schooling and also collecting workers' compensation benefits, address any of the other questions or provide any supporting documentation, e.g. confirming that his schooling was by correspondence, or that he was the only adult or caregiver resident at his address.

[25] I am prepared, however, to grant leave to appeal on the basis that the Applicant may not have been provided with a fair opportunity to fully present his case, if he did not receive the October 2016 letter from the General Division. I am satisfied that there is an

arguable case to be made out that, had the Applicant received the October 2016 letter from the General Division, he might have adduced some evidence regarding the CRDO issues.

[26] Although I have granted leave to appeal, the Applicant should be prepared to provide some evidence of what his responses might have been to the issue of whether he was the primary caregiver for his two eldest children, had he received the October 2016 letter from the General Division. He should also be prepared to demonstrate how his responses could have established that he was indeed the primary caregiver for his two eldest children. It is not sufficient, for instance, to simply allege that he was the primary caregiver, and to cite dates, without providing some documentary evidence of this. Otherwise, even if I should ultimately find that the Applicant might have been deprived of the opportunity to present his case, it may become an academic consideration only, with no real effect on the outcome of the proceedings.

Did the General Division err in law?

[27] Although I have granted leave to appeal, I will briefly review the other issues that the Applicant raises.

[28] The Applicant argues that the General Division erred in law because it failed to exclude certain periods from his contributory period. It should be noted that there are different provisions under the *Canada Pension Plan* for calculating the contributory period in respect of a disability pension versus a retirement pension. Section 49 of the *Canada Pension Plan* defines the contributory period of a contributor for the purpose of calculating a retirement pension.

[29] The Applicant claims that the General Division failed to exclude the following periods:

- when he was severely disabled;
- when he was the primary caregiver for his children;
- when he was collecting workers' compensation benefits;

- when he was attending correspondence classes; and

- when he was unemployed.

[30] The Applicant largely revisits the same arguments that he had previously advanced before the General Division. The General Division methodically reviewed each of the Applicant's arguments regarding appropriate exclusionary periods. The General Division noted that there are three types of dropout provisions in the *Canada Pension Plan*: the general dropout provisions, the disability dropout provisions and the CRDO provisions. It addressed each of these provisions, as well as the Applicant's argument that he was entitled to exclude the months when he was at school, when he was unemployed and when he was receiving workers' compensation benefits. I will review each of these, to determine whether there is an arguable case that the General Division might have erred in law in considering whether these circumstances allowed for any additional exclusions from the contributory period. I have already discussed the applicability of the CRDO provisions above.

Is an exclusion available for periods of severe disability, even if an applicant was not receiving a Canada Pension Plan disability pension?

[31] No. The Applicant is unable to exclude months dating back to April 1997, when he was injured and became disabled. He can exclude only the months in which he was deemed disabled under the *Canada Pension Plan*.

[32] The Applicant was involved in a workplace accident on April 5, 1997, in which he sustained a serious spinal cord injury. He has been unable to work since then and maintains that the months dating back to April 1997 should be excluded from his contributory period or, alternatively, that the contributory period should have ended in April 1997.

[33] The Respondent's position has been that the Applicant must have been in actual receipt of a Canada Pension Plan disability pension before those months can be excluded. The Applicant was deemed disabled in July 2008 and payment of a disability pension commenced in November 2008. He turned 65 in August 2010 and his disability pension

was thereby converted to a retirement pension. If the exclusionary months include only the months when the Applicant received a disability pension, then I calculate that there are 22 months within this timeframe, between November 2008 and August 2010 — rather than 25 months, as the Respondent calculates. However, neither the Respondent nor the Applicant questions the fact that 25 months should be excluded from the contributory period for the purposes of the retirement pension.

[34] Under paragraph 49(*c*) of the *Canada Pension Plan*, the contributory period excludes "any month that was excluded from the contributor's contributory period under the [*Canada Pension Plan*] by reason of disability."

[35] The expression, "by reason of disability," set out in paragraph 49(*c*) of the *Canada Pension Plan*, indicates that the months to be excluded from the contributory period include those in which an applicant is found to have been disabled, rather than when he began receiving a Canada Pension Plan disability pension. The section does not stipulate that the exclusionary months include only those months in which the Applicant received a disability pension. In other words, 25 months is the appropriate number of months for exclusion in respect of the Applicant's disability under the *Canada Pension Plan*.

[36] Hence, section 49 of the *Canada Pension Plan* precludes dropping the months dating as far back as April 1997, as the Applicant was required to have been found disabled for the purposes of the *Canada Pension Plan* at that time. Given that his application for a disability pension had been accepted to have been filed in October 2009, the earliest that he could have been deemed disabled was in July 2008, pursuant to paragraph 42(2)(*b*) of the *Canada Pension Plan*. He could not have been deemed disabled any earlier than this for the purposes of the *Canada Pension Plan*, despite the fact that he was actually injured and disabled in April 1997. It was irrelevant for the purposes of calculating the contributory period or the exclusionary months that the Applicant's disability started in April 1997.

Is an exclusion available for periods of unemployment or schooling?

[37] There are no provisions under the *Canada Pension Plan* that allow for the exclusion of periods of unemployment or schooling from the contributory period. The General Division properly decided this issue.

Is an exclusion available for periods when an applicant collects workers' compensation benefits?

[38] There are no provisions under the *Canada Pension Plan* that allow for the exclusion of periods when an applicant collects workers' compensation benefits. The General Division properly decided this issue.

Is an exclusion available when a contributor's children are between the ages of 18 and 25 and in full-time attendance at a recognized school or university?

[39] The Applicant argues that the General Division failed to exclude the period from December 1999 to December 2009, when his children were between the ages of 18 and 25 and in full-time attendance at a recognized school or university. The Applicant's submissions to the General Division in respect of this particular issue were somewhat ambiguous (GD8-6). Even so, there are no provisions under the *Canada Pension Plan* that allow for the exclusion of any periods when a child was between the ages of 18 and 25 and in full-time attendance at a recognized school or university.

[40] It is unclear whether the Applicant ever sought or made an application for the disabled contributor's child's benefit (DCCB) on behalf of his children, when they were between the ages of 18 and 25 and in full-time attendance at a recognized school or university. He suggests that he is still waiting for payment of benefits. This issue is not properly before me and I have no jurisdiction or authority to make any determination regarding payment of any DCCB.

CONCLUSION

[41] The application for leave to appeal is granted on the issue of whether the General Division failed to observe a principle of natural justice and deprived the Applicant of the opportunity to fully present his case, particularly on the issue of whether the CRDO provisions were available to him in respect of his two eldest children.

[42] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal becomes the notice of appeal. Within 45 days after the date of this decision, the parties may either file submissions or file a notice stating that they do not have any submissions to file. The parties may make submissions regarding the form the hearing of the appeal should take (e.g. by teleconference, videoconference, in person or on the basis of the parties' written submissions), together with submissions on the merits of the appeal.

Janet Lew
Member, Appeal Division