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

Citation: *Minister of Employment and Social Development v. S. R.*, 2018 SST 239

Tribunal File Number: AD-17-984

BETWEEN:

Minister of Employment and Social Development

Applicant

and

S. R.

Respondent

and

D. R.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: March 15, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is granted.

OVERVIEW

[2] This application raises questions about the circumstances in which constitutional issues can be raised during an appeal for benefits under the *Canada Pension Plan* (CPP).

[3] The Respondent, S. R., applied for an early CPP retirement pension in April 2015. The Applicant, the Minister of Employment and Social Development (Minister), approved the application with an effective date of August 2015. The calculation of benefits took into account the operation of a division of unadjusted pensionable earnings (DUPE) and the child-rearing dropout provision (CRDO).

[4] S. R. requested a reconsideration of the calculation of his retirement benefit because he felt that the application of the CRDO after the DUPE created a significant inequity. Instead, he said, the CRDO and DUPE should be applied in conjunction with each other. The Minister maintained its original decision on reconsideration.

[5] S. R. appealed the Minister's decision to the General Division of the Social Security Tribunal of Canada, alleging that the interaction of the CRDO and DUPE gave preferential treatment to women. In a letter dated April 11, 2017, the General Division informed S. R. that, if he wanted to pursue a constitutional challenge, he was required to file a notice in accordance with paragraph 20(1)(*a*) of the *Social Security Tribunal Regulations* (SSTR). On May 9, 2017, S. R. replied that preferential treatment to women was not the basis of his appeal. Rather, he was concerned with how, in his view, the DUPE and CRDO effectively eliminated contributions in a way that is "inconsistent with the fairness, legality and duty of care required from a government process."

[6] In a notice dated June 1, 2017, the General Division found that S. R. had not complied with paragraph 20(1)(*a*) of the SSTR because he had failed to set out the provision of the CPP

that he was putting at issue. He was given until June 19, 2017 to file a further response that complied with the SSTR requirements. S. R. did not respond to this request.

[7] On July 19, 2017, the General Division scheduled a pre-hearing conference to, among other things, discuss whether S. R. had complied with the requirements of paragraph 20(1)(*a*) of the SSTR. At the hearing, held on August 26, 2017, S. R. reiterated that he was not alleging gender bias as a ground. Rather, he complained that he had been required to transfer pension credits to his wife, yet she had not received a benefit from all of them because her CRDO years were dropped from her contributory period by application of the low income dropout provision. He stated that his CPP contributions were an asset that should have been held in trust but were stolen through "accounting trickery."

[8] On November 9, 2017, the General Division rendered an interlocutory decision. It found that S. R. had complied with the requirements of paragraph 20(1)(*a*) of the SSTR and therefore deemed the proceeding a constitutional appeal. The General Division concluded:

> Although the Appellant is not alleging that any specific provisions of the CPP infringe the Charter, his challenge relates to the operation of the DUPE and CRDO provisions and he alleges that in this case their operation is "inconsistent with the fairness, legality, and duty of care required from government process." Paragraph 20(1)(a) of the Regulations only requires that the Appellant set out the provisions of the CPP that are "put at issue" and submissions in support of the issue that is raised.

[9] The Minister now seeks leave to appeal this decision, alleging that the General Division erred in in law when it found that S. R. had raised a constitutional issue.

ISSUES

[10] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. An appeal may be brought only if the Appeal Division first grants leave to

appeal,[1] but the Appeal Division must first be satisfied that the appeal has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[11] The General Division decision dated November 9, 2017 is an interlocutory decision, since the merits of the appeal of the Minister's reconsideration decision have yet to be determined. As a result, there is the preliminary question of whether the Appeal Division has jurisdiction to entertain this application for leave to appeal before the General Division has issued a final disposition.

[12] Should I be satisfied that the Appeal Division has jurisdiction, I will then determine whether the Minister has presented an arguable case that the General Division erred, according to subsection 58(1) of the DESDA, in permitting S. R.'s appeal to proceed on a constitutional question.

ANALYSIS

Issue 1: Does the Appeal Division have jurisdiction over interlocutory decisions?

[13] It is a well-established rule that parties can proceed to the courts only after all adequate remedial recourses in the administrative process have been exhausted. The Federal Court of Appeal explained the basis for this principle in *C.B. Powell Limited*:[4]

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative

[1] DESDA at subsections 56(1) and 58(3).
[2] *Ibid*. at subsection 58(1).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[4] *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61.

> process has finished or when the administrative process affords no effective remedy can they proceed to court.

[14] The Appeal Division has taken two approaches to interlocutory decisions:

- In most cases,[5] the Appeal Division has determined that there should be no immediate appeal of an interlocutory decision, except in exceptional circumstances, as long as the General Division remains seized of the matter.

- In a minority of cases,[6] the Appeal Division has interpreted the relevant jurisprudence to mean that recourse to the courts is available only after all remedies in the administrative sphere have been exhausted. By implication, *Powell* and related cases do not prevent appeals of interlocutory decisions within the administrative framework established by statute.

[15] Although I am inclined to the second view, I need not choose between the above approaches because I see "exceptional circumstances" that warrant intermediate action in this case. I am mindful of the rationale for barring interlocutory appeals—preventing the expenditure of time and public resources adjudicating questions that would have been decided in any event—but those considerations are balanced by larger concerns.

[16] The Appeal Division has previously declined to consider appeals of interlocutory decisions (i) refusing extensions of time to file or (ii) declaring non-compliance with paragraph 20(1)(*a*) of the SSTR. As far as I can see, this is the first appeal of an interlocutory decision in which the General Division ordered an appeal to proceed on a constitutional question despite the reluctance of the claimant. The Minister alleges that, in doing so, it neglected its mandate to guard against frivolous arguments under the *Canadian Charter of Rights and Freedoms* (Charter).

[17] This is a serious allegation that goes to the heart of the Tribunal's function as gatekeeper and gives rise, in my view, to "exceptional circumstances." Constitutional issues are typically

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[5] For example, *A. N. v. Minister of Employment and Social Development*, 2015 SSTAD 280 and *W. F. v. Canada Employment Insurance Commission*, 2016 SSTADEI 53.
[6] *Minister of Employment and Social Development v. J. P.*, 2016 SSTADIS 509; *Minister of Employment and Social Development v. P. F.*, 2017 SSTADIS 321.

complex, and Parliament never intended them to be casually raised before administrative tribunals. For this reason, section 20 of the SSTR sets out an involved and formal process, overseen by the Tribunal, in which a claimant with a constitutional argument must file a notice (i) specifying the section(s) of the *Old Age Security Act*, *Employment Insurance Act* or CPP at issue and (ii) setting out submissions in support of that issue. The claimant must subsequently serve the notice on the Attorney General of Canada and the attorney general of each province and territory. A failure to enforce this process could potentially lead to wasted time and public resources—which, as it happens, is the same risk that the presumption against interlocutory appeals is meant to mitigate.

[18] In my view, this is one of those rare occasions that justify consideration of an interlocutory application, as its intended purpose is to force the General Division to carry out its constitutional gatekeeping duties in compliance with the law. The Minister should not be made to wait to seek a remedy until the purported constitutional issue has been fully adjudicated, by which time and public resources will have already been spent, possibly for no valid purpose.

Issue 2: Is there an arguable case that the General Division erred in permitting S. R.'s appeal to proceed on a constitutional question?

[19] Having decided to consider this interlocutory matter, I must determine whether the Minster's reasons for appealing have a reasonable chance of success.

[20] At this preliminary stage, I think the Minister has raised at least an arguable case. First, there is some doubt whether, in fact, a "party" raised the constitutional issue, as seems to be required under subsection 20(1) of the SSTR. Although S. R. invoked principles of equality and fairness in his submissions to the General Division, he did not make any reference to the Charter. This by itself would not determine the matter, but S. R. later specifically denied that his argument was founded on gender bias and demurred when asked if he wanted it deemed a constitutional challenge. The record suggests that it has been the presiding General Division member, and not S. R., who has been attempting to cast the issues in constitutional terms.

[21] Second, I see an argument that S. R. has not fulfilled either requirement of paragraph 20(1)(*a*) of the SSTR. Although he provided detailed submissions about the unfairness that

allegedly results where the CRDO and DUPE intersect, he did not name any specific provisions of the CPP that infringe the Charter—a fact acknowledged by the General Division. A related question is whether S. R.'s submissions, which, as mentioned, do not refer to a specific section of the Charter, "support" the issue that is raised.

CONCLUSION

[22] I am granting unrestricted leave to appeal. Should the parties choose to make further submissions, they are free to offer their views on whether a hearing is required and, if so, what format is appropriate.

[23] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division

REPRESENTATIVE:	Sylvie Doire, Department of Justice