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

Citation: *R. M. v Minister of Employment and Social Development and The Estate of W. M.*, 2019 SST 380

Tribunal File Number: AD-18-563

BETWEEN:

R. M.

Appellant

and

Minister of Employment and Social Development

Respondent

and

The Estate of W. M.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 26, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, R. M., was married for 24 years. She and her former husband, a contributor to the Canada Pension Plan who is now deceased, divorced on January 16, 1986. On February 18, 2016, the Appellant applied for a Division of Unadjusted Pensionable Earnings (DUPE), seeking a share of her former husband's Canada Pension Plan credits.

[3] The Respondent, the Minister of Employment and Social Development (Minister), refused the application, initially and on reconsideration, because it was made more than three years after she and her former husband were divorced.

[4] The Appellant appealed the Minister's determination to the General Division of the Social Security Tribunal. In a decision dated July 26, 2018, the General Division summarily dismissed the Appellant's appeal because it had no reasonable chance of success.

[5] On September 4, 2018, the Appellant filed an incomplete appeal of the summary dismissal with the Tribunal's Appeal Division, asking it to "take another look." She said that she found it difficult to explain herself in writing. She added that, when she was divorced, her lawyer had not mentioned anything about the Canada Pension Plan; if he had, then she would have applied for a credit split at the time.

[6] The Tribunal asked the Appellant to provide additional reasons for her appeal. In a letter dated March 7, 2019, she repeated that she was unaware, at the time of her husband's death, that his Canada Pension Plan credits could be split. She wrote that she would have benefited from the additional money because her former husband did not pay her any child support, and she was solely responsible for raising their three children and giving them an education.

[7] No leave to appeal is necessary in the case of an appeal brought under section 53(3) of the *Department of Employment and Social Development Act* (DESDA), because there is an appeal as of right when the matter involves a summary dismissal from the General Division.

[8] I have decided that an oral hearing is unnecessary and that the appeal will proceed on the basis of the written record because there are no gaps in the file and there is no need for clarification.

ISSUES

[9] According to section 58 of the 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.

[10] The issues before me are as follows:

Issue 1: Did the General Division apply the correct test for a summary dismissal?

Issue 2: Did the General Division err when it found that the Appellant's DUPE application missed a three-year time limitation?

ANALYSIS

Issue 1: Did the General Division apply the correct test for summary dismissal?

[11] I am satisfied that the General Division used the appropriate mechanism to decide the Appellant's appeal. In paragraph 1 of its decision, the General Division invoked section 53(1) of the DESDA, correctly citing the provision that permits it to summarily dismiss an appeal that has no reasonable chance of success. However, I acknowledge that it is insufficient to simply cite legislation without properly applying it to the facts.

[12] The decision to summarily dismiss an appeal relies on a threshold test. It is not appropriate to consider the case on the merits in the parties' absence and then find that the appeal

cannot succeed. In *Fancy v Canada*,[1] the Federal Court of Appeal determined that a reasonable chance of success is akin to an arguable case at law. The Court also considered the question of summary dismissal in the context of its own legislative framework and determined that the threshold for summary dismissal is high.[2] The decision-maker must determine whether it is plain and obvious on the record that the appeal is bound to fail. The question is **not** whether the decision-maker must dismiss the appeal after considering the facts, the case law, and the parties' arguments. Rather, the question is whether the appeal is destined to fail regardless of the evidence or arguments that might be submitted at a hearing.

[13] Here, the record shows that the Appellant did not apply for a DUPE until nearly 30 years after her divorce. The General Division correctly applied a high threshold when it found that the appeal had "no reasonable chance of success," because the Appellant's DUPE application came long after the expiry of the 36-month deadline that was in effect at the time. For reasons that I will explain more fully below, it was plain and obvious on the record that the Appellant's submissions were bound to fail.

Issue 2: Did the General Division err when it found that the Appellant's DUPE application missed a three-year time limitation?

[14] Having reviewed the General Division's decision, I see no error that might warrant intervention.

[15] Under section 55(1) of the *Canada Pension Plan* (CPP), where former spouses were divorced after January 1, 1978 and before January 1, 1987, an application for a DUPE must be made within 36 months of the divorce, unless both former spouses agree in writing to the application being made after this time period.

[16] The General Division denied the Appellant's appeal because her DUPE application was received in February 2016, 29 years after her divorce and well past the three-year time limit specified in section 55(1) of the CPP.

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; *Breslaw v Canada (Attorney General)*, 2004 FCA 264.

[17] Having carefully examined the decision, I can find no indication that the General Division breached a principle of natural justice or committed an error in fact or law. The General Division assessed the record and concluded that the Appellant, having been divorced between January 1, 1978 and January 1, 1987, was effectively barred from applying for a credit split. There is nothing in the file to suggest that the Appellant's former husband waived the three-year time limitation, and he is now deceased. The General Division saw no arguable case on any ground raised by the Appellant, and I see no reason to interfere with its reasoning. My authority permits me to determine only whether any of his reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. While the General Division's analysis did not arrive at the conclusion the Appellant would have preferred, it is not my role to reassess the evidence, but rather to determine whether the decision is defensible on the facts and the law.

[18] The Appellant understandably did not know that applying for a DUPE was time-limited, but unfortunately the CPP makes no allowances for claimants, or potential claimants, who may be unaware of the intricacies of the law. The Appellant may feel that the time limitation is unfair, but the Appeal Division, like the General Division, must follow the letter of the law. We can exercise only such jurisdiction as granted by our enabling statutes, and we do not have the discretion to provide a remedy on compassionate grounds. Support for this position may be found in *Canada v Tucker*,[3] among many other cases, which have held that administrative tribunals are not courts but statutory decision-makers and are therefore not empowered to provide any form of equitable relief.

CONCLUSION

[19] The Appellant has not shown that she is eligible for a credit split, nor has she demonstrated how the General Division acted unfairly or committed an error.

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[3] *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.

[20] The appeal is therefore dismissed.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVE:	R. M., self-represented