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

Citation: *C. W. v Minister of Employment and Social Development*, 2019 SST 768

Tribunal File Number: AD-19-520

BETWEEN:

C. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: August 16, 2019

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

INTRODUCTION

[2] In November 2015, the Applicant, C. W., submitted an online application for a Canada Pension Plan (CPP) early retirement pension. The application did not require her to disclose her date of birth. Nevertheless, the Respondent, the Minister of Employment and Social Development (Minister) granted the application, relying on information in his department's database indicating that the Applicant was born on October 14, 1953.

[3] In late 2018, the Minister notified the Applicant that she was about to turn 65 and was eligible to apply for an Old Age Security pension. At that point, she became aware of a discrepancy between the Minister's record of her year of birth—1953—and her true year of birth—1955.

[4] When the Minister approved the Applicant's early retirement pension, it was under the impression that she was 62 years old when, in fact, she was 60. This made a difference, because, generally speaking, the monthly amount of the retirement pension increases the longer one waits to apply for it. In a letter dated September 20, 2018, the Minister informed the Applicant of the birth date discrepancy and demanded that she repay $4,968 of the amount that she had received from December 2015 to August 2018.

[5] On March 4, 2019, beyond the 90-day time limit set out in the *Department of Employment and Social Development Act* (DESDA), the Applicant appealed the Minister's demand for repayment to the General Division of the Social Security Tribunal. In a decision dated April 23, 2019, the General Division refused to grant the Applicant an extension of time to appeal. In particular, the General Division found that extending time would serve no purpose, since the Applicant's appeal did not have a reasonable chance of success.

[6] On July 24, 2019, the Applicant filed an application for leave to appeal with the Tribunal's Appeal Division, alleging various errors on the part of the General Division, specifically:

- The General Division refused her an extension of time to appeal even though it acknowledged that she had a reasonable explanation for the delay;
- The General Division did not address the fact that she had applied for her CPP retirement pension in good faith and had never attempted to deceive the government about her age.
- The General Division disregarded evidence that the discrepancy about her age was not her fault but the result of an administrative error by the Minister.

[7] Having reviewed the record, I have concluded that the Applicant's submissions have no reasonable chance of success on appeal.

ISSUES

[8] 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 before it.

[9] 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]

[10] I must decide whether the Applicant has presented an arguable case on any of the following questions:

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[1] DESDA, at ss. 56(1) and 58(3).
[2] *Ibid*., at s. 58(2).
[3] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Issue 1: Did the General Division err in law when it refused the Applicant an extension of time, even though she had a reasonable explanation for her delayed appeal?

Issue 2: Did the General Division ignore the fact that the Applicant had never attempted to deceive the government about her age?

Issue 3: Did the General Division disregard evidence that the discrepancy about the Applicant's age resulted from the Minister's administrative error?

ANALYSIS

Issue 1: Did the General Division err in law when it refused the Applicant an extension of time even though she had a reasonable explanation for her delayed appeal?

[11] I do not see an arguable case on this question. The General Division was correct to note that the Applicant's appeal was submitted to the Tribunal well after the 90-day limit, and I do not see an arguable case that the General Division incorrectly applied the principles of *Canada v Gattellaro*.[4]

[12] *Gattellaro* sets out four factors that must be considered in deciding whether to grant an extension of time. The weight to be given to each of the *Gattellaro* factors may differ in each case, and in some cases, different factors will be relevant.

[13] The General Division found that the Applicant succeeded on three of the four factors but failed on the fourth. It found that the Applicant had a reasonable explanation for the delay, a continuing intention to pursue the appeal, and little chance of prejudicing the Minister's interests, but it also found that her lack of an arguable case overrode all other considerations: "[T]here is no purpose in allowing an extension of time to appeal where, on the basis of the facts, there is no reasonable chance of success."[5]

[14] Each of the *Gattellaro* factors must be considered, but they do not have to be given equal weight. As the General Division rightly noted, the overriding consideration is that the interests of

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[4] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.but it
[5] General Division decision, para 17.

justice be served.[6] The General Division has a mandate, as finder of fact, to weigh the available evidence and apply it to the law.[7] I see no reason to interfere with its finding that the Applicant was, in fact, 60 years old when she applied for, and began receiving, her CPP retirement pension. The law is clearly states that the monthly amount of the pension is lower if it commences at 60, as opposed to 62, which is the age that the Minister believed—erroneously—that the Applicant had attained at the time of application.

Issue 2: Did the General Division ignore the fact that the Applicant never attempted to deceive the government about her age?

[15] This matter arose because of a mix-up that likely occurred decades ago when the Applicant first applied for a social insurance number. The Applicant suspects that a government clerk misread the birth year on her birth certificate as 1953 rather than 1955 and that the mistake was then entered into the Minister's records, not to be come an issue until she approached retirement years later.

[16] No one has suggested that the Applicant was attempting to defraud the government, but she still feels that she is being penalized through no fault of her own. She wonders why the General Division was silent about the circumstances that led to the confusion about her birth year.

[17] I can understand the Applicant's frustration, but I do not see an arguable case that the General Division erred by failing to address any the errors that the Minister might have made. In the final analysis, they are irrelevant. The Applicant acknowledges that she was only 60 when she applied for the CPP retirement benefit and, for someone in her position, the law prescribes a lower amount than what she had been receiving.

[18] The Applicant pleads that forcing her to repay the government nearly $5,000 will cause her financial hardship. Again, I sympathize, but my powers are limited. The General Division was bound to follow the letter of the law, and so am I as a member of the Appeal Division. We cannot simply order the Minister to waive its demand for repayment, however fair or reasonable we think that might be. Such broad power, known as "equity," has traditionally been reserved to

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[6] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[7] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

the courts, although even they typically exercise it only if the law is not enough to resolve the issue. *Canada v Tucker*,[8] among many other cases, has confirmed that an administrative tribunal, such as the Social Security Tribunal, is not a court but a statutory decision-maker and, therefore, is not empowered to provide any form of equitable relief.

Issue 3: Did the General Division disregard evidence that the discrepancy about the Applicant's age resulted from the Minister's administrative error?

[19] Again, I do not see an arguable case for this submission.

[20] The Applicant argued that the Minister committed two errors: recording her date of birth incorrectly and failing to notice its mistake until nearly three years after it had approved her retirement pension. The Minister has not admitted to any mistakes, but, even if it had, there was nothing, in my view, that the General Division could have done about it.

[21] Section 66(4) of the *Canada Pension Plan* provides a remedy for Ministerial error: "Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied a benefit, or portion thereof, to which that person would have been entitled […], the Minister shall take such remedial action as the Minister considers appropriate…"

[22] In this case, I am not sure whether it can be fairly said that the Applicant, who has been ordered to repay money to which she had no legal entitlement, was "denied a benefit." Even so, Parliament's use of the word "satisfied" suggests that use of this power is left to the Minister's choice or judgment. The Minister has the discretion to place a person in the position that they would have been in had the erroneous advice not been given, but, in this case, the Minister has chosen not to exercise its discretion to provide a remedy. Case law, led by *Pincombe v Canada*,[9] has held that neither the General Division nor the Appeal Division has the jurisdiction to review a discretionary decision of the Minister.

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[8] *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.
[9] *Pincombe v Attorney General of Canada*, [1995] F.C.J. No. 1320.

CONCLUSION

[23] I do not see an arguable case for any of the Applicant's reasons for appealing the General Division's decision.

[24] Leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	C. W., self-represented