



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. C. v Minister of Employment and Social Development*, 2020 SST 324

Tribunal File Number: GP-17-1757

BETWEEN:

T. C.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: David Chodikoff

Minister represented by: John Unrah

Videoconference hearing on: June 25, 2019

Date of decision: February 19, 2020

DECISION

[1] Paragraph 67(3.1)(c) of the *Canada Pension Plan* (CPP) does not infringe the Claimant's rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The Claimant is not entitled to an earlier start date for payment of his CPP retirement pension.

OVERVIEW

[2] The Claimant turned 70 in November 2012. In March 2016, he applied for the CPP retirement pension. The Minister allowed the application with an effective payment start date of April 2015. This is the maximum period of retroactivity permitted under paragraph 67(3.1)(c) of the CPP, which provides that the retirement pension for applicants over 65 commences on the eleventh month preceding the month the Minister received the application.

[3] Because of this provision, the Claimant did not receive any retirement benefits for the period from November 2012 (when he turned 70), to April 2015 (the earliest month his payments were payable based on his March 2016 application date). In addition, he was not entitled to an increased monthly pension even though he did not receive a pension for this period. If he succeeds on the appeal, he will be entitled to an arrears payment of \$41,498.34.¹

[4] The Claimant takes the position that paragraph 67(3.1)(c) of the CPP infringes his rights under section 15(1) *Charter* because of age and that the limit on retroactivity is discretionary.

[5] The Claimant also says that the Minister did not properly notify him of the adverse consequences, if he delayed applying for a CPP retirement after he turned 70.

ISSUES

1. Is the limit on retroactivity in paragraph 67(3.1)(c) of the CPP discretionary?
2. Do I have jurisdiction to determine if the Minister gave sufficient notice to the Claimant of the adverse consequences if he delayed applying for CPP retirement after he was 70?
3. If so, did the Minister give the Claimant sufficient notice?

¹ GD24-170

4. Does paragraph 67(3.1)(c) of the CPP discriminate against the Claimant based on age contrary to section 15(1) of the *Charter*?
5. If so, can the violation be justified as reasonable in a free and democratic society under section 1 of the *Charter*?

POST-HEARING SUBMISSIONS AND EXPERT REPORT

[6] At the hearing, Mr. Chodikoff, counsel for the Claimant, raised new issues and referred to evidence that was not in the hearing file. Both Mr. Chodikoff and Mr. Unrah, counsel for the Minister, indicated they wished to file additional written submissions. In view of this, I made the following directions for post-hearing submissions: ²

1. The Claimant is to file his additional submissions and documents by August 26, 2019.
2. The Minister is to file his additional submissions and documents by October 28, 2019.
3. The Claimant is to file reply submissions, if any, by November 15, 2019.

[7] The Minister filed an expert report of CPP Policy and Legislation with its additional submissions.³ However, it did not provide the name or qualifications of the report's author. The Claimant objected to the admissibility of the report because it did not meet the fundamental criteria for acceptance as an expert report.⁴

[8] In response, the Minister identified the author of the report as Andrew Williamson, a senior legislative officer for CPP policy and legislation. The Minister also filed Mr. Williamson's curriculum vitae. The Minister advised that Mr. Williamson was available to speak to the report and respond to questions.⁵ The Claimant did not submit any questions for Mr. Williamson. Nor did he indicate that he wanted Mr. Williamson to give oral evidence.

[9] After reviewing Mr. Williamson's curriculum vitae, I determined that he was qualified as an expert in CPP policy and legislation to provide evidence concerning the legislative history and

² GD19

³ GD24-149 to 304

⁴ GD27-9 to 10, paras 23 to 29

⁵ GD28

administration of the CPP program. He has been a legislation officer with the CPP since 2008. Prior to that, he was a Research and Policy Officer and Client Service Officer with the Office of the Commissioner of Review Tribunals from 2000 to 2007. He has, amongst other tasks, researched and drafted proposals for amendments to the CPP, prepared drafting instructions for legislative amendments to the CPP, and served as instructing client to Department of Justice drafters for the purposes of legislative amendments. He has also appeared as an expert witness on the CPP before several tribunals including the Social Security Tribunal with respect to *Charter* appeals.

[10] I admitted Mr. Williamson's report as an expert report. The report discusses, amongst other matters: an overview of the CPP; the benefits available under the CPP; the amendments to the CPP since 1987 to allow more flexibility for retirement planning; the legislative history of retirement pension retroactivity; and the departmental information available for retirement pension applicants.⁶

ANALYSIS

The limit on retroactivity in paragraph 67(3.1)(c) is not discretionary

[11] Mr. Chodikoff argues that paragraph 67(3.1)(c) is not a restrictive guideline, rather it is a permissive or discretionary one. He further argues that the discretionary nature of the provision is confirmed by the information sheet referred to by the Claimant in his notice of appeal. This information sheet provides information about how to complete the CPP retirement application.⁷

[12] The information sheet states, amongst other things:

If you are applying after your 65th birthday, you can choose to receive retroactive payments, but they cannot begin earlier than the month after your 65th birthday. In general, we can make retroactive payments of CPP benefits for up to 12 months (11 months plus the month you apply).

If you delay applying for your CPP retirement pension after you turn 70, you risk losing benefits. There is no financial benefit in delaying your pension after 70.

⁶ GD24-153 to 170

⁷ GD1-18 to 26

[13] Mr. Chodikoff argued that if paragraph 67(3.1)(c) is a restrictive guideline the Minister would not have used the word risk. Rather, the Minister would have used a phrase such as “you shall lose.” If the intention were to completely restrict the benefits, the information sheet would have stated that individuals above the age of 70 will lose benefits.⁸

[14] Mr. Unrah argues that the 11-month limit on retroactivity is a hard limit created by paragraph 67(3.1)(c). There is no flexibility in the language of the provision. The wording is precise and clear, and creates no ambiguity.

My Findings

[15] Subsection 67(3.1) of the CPP sets out the payment commencement date for retirement pensions that start on or after January 1, 2012. It expressly states that payment commences the *latest* (emphasis added) of the dates set out in the applicable subsections. Item (c) deals with applicants like the Claimant who are 65 or older. It states that payment commences the eleventh month preceding the month the application was received. There is no ambiguity and there is no provision giving the Minister a discretion to provide for further retroactivity.

[16] There is only one principle or approach to the modern principles of statutory interpretation. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. There is nothing in the context or objects of the CPP to suggest that the words in paragraph 67(3.1)(c) create an unreasonable or inequitable result if interpreted in their ordinary and grammatical sense.⁹

[17] On the other hand, to interpret this provision as discretionary would create an absurd result. Applicants like the Claimant would be exempt from the 11-month limit on retroactivity, while more vulnerable CPP applicants for the disability, survivor, disabled contributor’s child, and orphan benefits, are not.¹⁰

⁸ GD22- 17 to 19, paras 26 to 34

⁹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, paras 21, 27

¹⁰ This is more fully discussed in paras 43 to 46, below

[18] The proper focus when interpreting legislation is, and must always be, on what the legislator actually said, not on what one might wish or pretend it to have said. I must take the legislation as it is, discern, and apply its authentic meaning – nothing else.¹¹

[19] I recognize that social benefits conferring legislation like the CPP should be interpreted in a broad and generous manner and any doubt arising from the language of such legislation ought to be resolved in favour of the Claimant.¹² However, paragraph 67(3.1)(c) is clear and unambiguous. There is no doubt from its language about the 11-month limit on retroactivity.

[20] There is no contradiction between the statutory provisions and the information sheet. If individuals apply more than 11 months after the age of 70, they will lose benefits. If they apply less than 11 months after the age of 70, they will not lose benefits. The information sheet is accurate when it states there is a risk of losing benefits by delaying an application past the age of 70.

[21] Further, even if there is a contradiction, the statutory provision is paramount. An information sheet prepared by a Ministry official cannot change the clear and unambiguous language of a statutory provision.

[22] The Tribunal is a statutory decision-maker, which means that I can only make decisions on the basis of what the statute says, here the CPP. I am required to interpret and apply the provisions as they are set out in the CPP. I have no authority to make exceptions to the provisions of the CPP.

[23] I find that the limit on retroactivity in paragraph 67(3.1)(c) is not discretionary.

I do not have jurisdiction to decide if the Minister gave sufficient notice of adverse consequences

[24] Mr. Chodikoff argues that the Minister did not provide sufficient notice to the Claimant of the adverse consequences of delaying applying for CPP retirement after turning 70. He submitted that the government should be clear in the advice it gives to contributors. Since it

¹¹ *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 at paras 28 to 30

¹² *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 1 S.C.R 27, para 36

failed to give clear advice, the government should be responsible for the Claimant's loss of pension benefits.

[25] In his notice of appeal, the Claimant stated that his only prior information from Service Canada about the retirement pension was an attachment to his September 2011 CPP statement of contributions that discussed important changes to the CPP. According to the Claimant, this attachment encouraged a delay in taking the retirement pension by emphasizing the advantages of delay until after turning 65. However, the attachment did not provide cautionary comments about any adverse consequences of delaying until after turning 70.¹³

[26] The Claimant also referred to an information sheet that he received with his application for the retirement pension. However, it would appear that he did not receive this until around March 2016, when he applied for the pension. In view of this, it could not have been a factor in the Claimant's decision to delay applying for CPP retirement.¹⁴

[27] Mr. Unrah argues that the onus is on applicants to apply for benefits in a timely manner.¹⁵ Even though the Minister is not obligated to inform an individual of their entitlement to a benefit, the Minister notified the Claimant that he risked losing benefits if he delayed applying after he reached 70. The Claimant is a sophisticated individual and it was his responsibility to make further inquiries about the risk, if he delayed applying after he was 70.¹⁶

My Findings

[28] The essence of the Claimant's claim is an allegation of erroneous advice or administrative error by the Minister. However, the Tribunal has no jurisdiction to make decisions with respect to such an allegation. The Tribunal is created by the *Department of Employment and Social Development Act* (DESD Act), and is bound and limited by the provisions of its creating Act.¹⁷

¹³ GD1-4; GD1-13 to 17

¹⁴ The information sheet is discussed in paras 12 to 14, above

¹⁵ GD12-11, para 25

¹⁶ GD12-11, para 25

¹⁷ *Curto v. MHRD (October 9, 1996), CP 3841 (PAB)*. Although this decision is not binding, I find it persuasive.

[29] Section 64(2) of the DESD Act provides that in the case of an application relating to the CPP, the Tribunal may *only* (emphasis added) decide questions of law or fact as to

- a) whether a benefit is payable to a person or its amount;
- b) whether a person is eligible for a division of unadjusted pensionable earnings, or its amount;
- c) whether a person is eligible for an assignment or a contributor's retirement pension or its amount; and
- d) whether a penalty should be imposed under Part II of the CPP or its amount.

[30] The remedy for an allegation of erroneous advice or administrative error is an application to the Minister under section 66(4) of the CPP. I have no jurisdiction to deal with that allegation. Only the Minister and the Federal Court (if the Claimant appeals the Minister's decision) has this jurisdiction.¹⁸

CHARTER ISSUES

Does paragraph 67(3.1)(c) of the CPP infringe the Claimant's section 15(1) Charter rights?

[31] For the reasons, that follow I have decided that it does not.

[32] The Canadian constitution is the supreme authority regarding any other Canadian law. The *Charter* is part of the constitution. It protects human rights by guaranteeing equality.

[33] Section 15(1) of the *Charter* provides that every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[34] The Supreme Court of Canada (SCC) has set out a two-part test for assessing a section 15(1) claim:¹⁹

1. Does the law create a distinction that is based on an enumerated or analogous ground?

¹⁸ *Canada (Attorney General) v. Dale*, 2006 FC 1364, paras 37 to 44; *Pincombe v. AG Canada* [1995] F.C.J. 1320.

¹⁹ *Withler v. Canada (Attorney General)*, 2011 SCC 12, para 61

2. If so, does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[35] This assessment requires a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on a claimant because of his or her membership in an enumerated or analogous group. It recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. A section 15 *Charter* analysis is focused on legislation that draws discriminatory distinctions that perpetuate a prejudice or create a stereotype.²⁰

Is there a distinction based on an enumerated or analogous ground?

[36] No. There is not.

[37] Mr. Chodikoff argues paragraph 67(3.1)(c) of the CPP creates a distinction based on the enumerated ground of age contrary to section 15(1) of the *Charter*. Since the Claimant was older than 70 when he applied, he does not receive the same amount of benefits as someone in similar circumstances who applied before they were 70. The loss of benefits as a result of this provision targets only one identifiable group – applicants who are over 70.²¹

[38] Mr. Unrah argues the Claimant’s loss of retirement benefits is due to his decision to delay submitting his application until he was 73. He continued working after 65 and delayed applying in order to have a larger pension. The Claimant is requesting that he be treated differently from other claimants who are limited to 11 months retroactivity

My Findings

[39] The Claimant must establish that he is being treated differently based on a personal characteristic that is protected under s. 15(1) of the *Charter*. This means he has to show that,

²⁰ *Quebec (Attorney General v A*, [2013] 1 S.C.R. 61, at paras 331 & 332

²¹ This is not completely accurate. The Claimant would have received the full amount of benefits in he applied by 11 months after he turned 70.

based on a personal characteristic, he is denied a benefit available to others or he must meet a greater burden than others must.²²

[40] The essence of the Claimant's complaint is that he is allowed only 11 months retroactive payments. He states that his loss of benefits is because he was over 70 when he applied and that he is being treated differently because of his age.

[41] I disagree.

[42] The Claimant is not limited to 11 months of retroactivity because of his age. Rather, he is limited because of his decision to delay applying for the CPP retirement pension. It is because of a choice he made and not because of a personal characteristic.

[43] He is not being treated differently than all other applicants for CPP retirement who apply after they are 65. Further, he is not being treated differently than other CPP applicants who apply for benefits such as the disability benefit, the survivor's benefit, the disabled contributor's child benefit, and the orphan's benefit. Those applicants are also not entitled to payment beyond an 11-month maximum period of retroactivity. All of those applicants are subject to the same limitation on retroactive payment. Like the Claimant, they lose benefits beyond the 11-month retroactivity period if they delay in making their application.²³

[44] I agree with Mr. Unrah that the Claimant being limited to 11-months of retroactive payments is because of the timing of his application. It is not because of his age. He is not being treated differently than virtually all CPP applicants who are also entitled to only 11 months of retroactive payments. These applicants can be any age.

[45] The Claimant appears to be requesting that the CPP retirement provisions be designed to meet his specific needs. In his March 2016 letter accompanying his retirement application, he stated that he did not answer when he wanted his pension to start on the application. This was

²² Withler, para 62, 64

²³ Expert Report: GD24 -160 to 161. There are only two exceptions to the maximum retroactivity. The first is if the incapacity provisions under subsections 60(8) and (9) of the CPP apply. The second is if the erroneous advice or administrative error provisions under subsection 66(4) apply.

because his objective was to maximize both monthly payments and the retroactive payment. He asked Service Canada to determine the appropriate start date on his behalf.²⁴

[46] However, the CPP is not supposed to meet everyone's needs, but rather to provide partial earnings replacement in certain circumstances. Contributions made to the CPP throughout a person's working life do not always translate into benefits. It may be that for some applicants, a different set of rules or conditions for certain benefits might be preferable but the CPP cannot meet the needs of all contributors in every conceivable circumstance, nor is it designed to do that.²⁵

[47] I find that the Claimant has failed to establish a distinction under section 15(1) of *Charter* with respect to the enumerated ground of age.

[48] Since the Claimant has not established a distinction based on an analogous or enumerated ground, he cannot establish a discriminatory distinction. Therefore, I do not need to address step two of the section 15(1) *Charter* test as to the existence of discrimination.

The 2019 Budget Amendments

[49] The federal March 2019 budget introduced amendments to sections 60 and 67 the CPP. These amendments provide that under some circumstances the Minister can automatically enrol persons over 70 for CPP retirement.²⁶

[50] These amendments permit the Minister to waive the requirement for an application if a contributor is at least 70 years old, and

- Is in receipt of a benefit under either the CPP or the Old Age Security Act, or
- An Income Tax return was filed on the person's behalf in the previous year.

[51] If payment is approved, the pension is payable for each month after the person reached 70.²⁷

²⁴ GD12-12

²⁵ *Runchev v Canada (Attorney General)*, 2013 FCA 16, paras 122 to 124

²⁶ The amendments came into effect in January 2020

²⁷ GD22-20, paras 37 & 38

[52] Mr. Chodikoff argues that this proposed amendment is a recognition by Parliament of the discriminatory impact of paragraph 67(3.1)(c) against persons such as the Claimant. The amendment supports the Claimant's position that widespread age discrimination exists in the present legislation. Under the amendment over 40,000 Canadians will receive a retirement benefit.²⁸

[53] Mr. Unrah argues that changes to legislation are not an admission of discrimination. The purpose of the amendments is to enhance flexibility for CPP retirement beneficiaries.

My findings

[54] I do not agree that the amendments to sections 60 and 67 the CPP are a recognition of discrimination.

[55] Nothing in the Hansard or other materials presented by Claimant supports that the proposed amendments are a recognition that the existing provisions are discriminatory. The amendments were one of several amendments to the CPP and the OAS designed to improve Canadians' retirement security. They address the problem that a small number of Canadians were missing out on CPP benefits because they either applied late or had not applied. Typically, these individuals had spent less time in the work force. As a result, they were more likely to have less income in retirement. The Government estimated that approximately 40,000 contributors were missing out.²⁹

[56] Parliament has made numerous amendments to the CPP retirement provisions since its inception in 1967 to provide more flexibility for contributors when planning their retirement. Making improvements to the CPP is not an admission or recognition of discrimination.³⁰

[57] I find that the 2019 Budget amendments are not evidence that paragraph 67(3.1)(c) of the CPP has a discriminatory impact under section 15 of the *Charter*.

²⁸ GD15 & GD22 paras 35 to 44

²⁹ Budget tabled in House of Commons on March 2019, GD15-9

³⁰ Expert report: GD24 -159 to 167

Section 1 of the Charter

[58] Section 1 of the *Charter* guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Since I have not found a *Charter* violation, I do not need to decide if any violation can be justified under section 1 of the *Charter*.

SUMMARY OF FINDINGS

1. Is the limit on retroactivity in paragraph 67(3.1)(c) of the CPP discretionary?

Answer: No. The limit is not discretionary.

2. Do I have jurisdiction to determine if the Minister gave sufficient notice to the Claimant of the adverse consequences if he delayed applying for CPP retirement after he was 70?

Answer: I do not have the jurisdiction to decide that question.

3. If so, was the notice insufficient?

Answer: I do not have the jurisdiction to decide that question.

4. Does paragraph 67(3.1)(c) of the CPP discriminate against the Claimant based on age contrary to section 15(1) of the *Charter*?

Answer: No. I found the Claimant has not established a distinction based on an analogous or enumerated ground. Consequently, I do not have to determine if the law is discriminatory.

5. If so, can the violation be justified as a reasonable limit in a free and democratic society under section 1 of the *Charter*?

Answer: I found the Claimant did not prove a violation to his Charter right. Therefore, I do not have to decide if the violation can be justified under section 1 of the *Charter* by the government.

CONCLUSION

[59] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security