



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. F. v Minister of Employment and Social Development*, 2020 SST 337

Tribunal File Number: AD-20-129

BETWEEN:

G. F.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 20, 2020

REASONS AND DECISION

DECISION

[1] The appeal is allowed. This matter will be returned to the General Division for another hearing.

OVERVIEW

[2] The Claimant was born in November 1942, and he applied for a Canada Pension Plan (CPP) retirement pension in April 2015. The Minister approved the application with a first payment date of May 2014, which it determined was the maximum period of retroactivity permitted under the law.

[3] The Claimant was unhappy with the Minister's determination of his pension's start date and appealed it to the Social Security Tribunal's General Division. He wanted his pension back paid to November 2007, the month he turned 65.

[4] In a decision dated November 28 2019, the General Division summarily dismissed the Claimant's appeal on the basis that it had no reasonable chance of success.

THE PARTIES' POSITIONS

[5] On February 26, 2020, the Claimant submitted a notice of appeal to the Appeal Division. In it, he made the following points:

- The General Division assumed that the issue in this case was retroactive benefits when, in fact, the issue was equal benefits for contributors with equal CPP credits.
- The General Division relied on a CPP provision that does not apply to contributors, like himself, who are not retired and who apply for the retirement pension before they actually retire. That provision does not meet the standards of equality, natural law, or fundamental justice.
- The General Division disregarded the fact that the CPP is designed to deliver equal benefits to contributors who, all else considered, have equal CPP credits. The

General Division's simplistic interpretation of the law results in a grossly inequitable result.

- The General Division failed to recognize that the CPP investment fund, with a value of \$409.5 billion, was established specifically to disburse benefits to deserving contributors. The fund's annual financial statements misrepresent its value because they do not disclose the value of unpaid benefits, which are, in effect, monies that the government holds in escrow on behalf of qualifying CPP contributors.

[6] The Claimant has filed numerous additional written submissions elaborating on these themes. On April 7, 2020, he filed an updated and corrected version of a previously submitted graph illustrating the cumulative financial impact on contributors who delay applying for a CPP retirement pension past the age of 65.¹ The graph showed that two individuals who, all else being equal, apply for the CPP retirement pension at the ages of 65 and 70, respectively, will collect the same amount of cumulative benefits by the time they both reach the age of 82. The graph also showed that a third individual who applies at age 74 will take much longer to accumulate the same financial benefit.

[7] On April 14, 2020, the Minister filed written submissions conceding that the General Division had failed to observe a principle of natural justice and failed to exercise its jurisdiction by not addressing the Claimant's constitutional arguments. The Minister asked the Appeal Division should to send the matter back to the General Division with instructions to address and make findings on those arguments.

[8] I see no need for a further hearing and have decided this appeal on the basis of the existing documentary record.² For the following reasons, I find that the General Division erred when it summarily dismissed the Claimant's appeal without having addressed all of his

¹ A CPP retirement applicant whose pension begins after age 65 will see payments increase by 0.7 percent each month (or by 8.4 percent per year) up to a maximum increase of 42 percent, if the pension begins at age 70 or after.

² Subsection 3(a) of the *Social Security Tribunal Regulations* requires proceeding as informally and quickly as circumstances, fairness and natural justice permit.

arguments, in particular a potential challenge of the CPP's retroactivity limitations under the *Canadian Charter of Rights and Freedoms* (Charter).

ISSUES

According to section 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law, whether or not the error appears on the face of the record; or
- (c) 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] I must decide the following questions:

Issue 1: Did the General Division breach a principle of natural justice or otherwise fail to exercise its jurisdiction by ignoring the Claimant's Charter argument?

Issue 2: Did the General Division err in law by failing to apply the correct test for summary dismissal?

ANALYSIS

Issue 1: Did the General Division breach a principle of natural justice or otherwise fail to exercise its jurisdiction by ignoring the Claimant's Charter argument?

[10] Although the Claimant did not explicitly raise this issue, it is reason enough to overturn the General Division's decision.

[11] The General Division determined that the Claimant was entitled to no more than 11 months of retroactive retirement pension payments. As the General Division noted, section 67(3.1) of the *Canada Pension Plan* says that the retirement pension commences the latest of: (a)

the twelfth month before the month after the month in which the application was filed; (b) the month in which the applicant reached the age of 65; or (c) a month chosen by the applicant.

[12] The General Division found that, since the Claimant's application date was April 2015, the earliest possible first payment date was May 2014. As far as the General Division was concerned, that ended the matter.

[13] However, when I examine the record, I see that the Claimant's argument went far beyond the correct interpretation of a particular section of the *Canada Pension Plan*. When the Claimant filed his appeal with the General Division, he also included lengthy and detailed written submissions arguing, among other things, that the "11-month rule" contravened section 15 of the Charter. In particular, the Claimant argued that the limit on retroactive pension payments created an unequal administration of CPP benefits based on age.

[14] None of this was mentioned in the General Division's decision. By failing to address the Claimant's Charter argument, the General Division ignored two important elements of natural justice—a claimant's right to be heard and a claimant's right to receive reasons for a decision affecting their welfare. The General Division's lapse in this instance is particularly notable because the *Social Security Tribunal Regulations* (SSTR) set out a specific process for raising Charter issues. As a first step, section 20(1)(a) requires a claimant to file a notice describing the provision at issue, as well as any submissions in support of that issue. There is no indication that the General Division ever considered whether the Claimant met those minimal requirements, even though, on the face of it, he did. This suggests to me that the General Division refused to exercise its jurisdiction over a live issue.

Issue 2: Did the General Division err in law by failing to apply the correct test for summary dismissal?

[15] The Claimant does not have legal representation and has not directly addressed the legal test for summary dismissal. However, his submissions express his view that the General Division dismissed his arguments without attempting to understand them.

[16] The General Division disposed of the Claimant's appeal by invoking section 53(1) of the DESDA, which allows it to summarily dismiss an appeal if it is satisfied that the appeal has no

reasonable chance of success. In paragraph 3 of its decision, and again at paragraph 12, the General Division correctly stated the wording of the relevant provision. However, it is insufficient to simply cite legislation without properly applying it.

[17] The Federal Court of Appeal has determined that the threshold for summary dismissal is very high.³ It is not appropriate to consider the merits of a case in the parties' absence and then find that the appeal cannot succeed. The question to be asked is whether it is plain and obvious on the record that the appeal is bound to fail. The question is *not* whether the appeal must be dismissed after considering the facts, the case law, and the parties' arguments. Rather, the question is whether the appeal is destined to fail regardless of evidence or arguments that might be submitted at a hearing.⁴

[18] As noted, the General Division did not consider the Claimant's Charter argument and looked at his case only through the lens of section 67(3.1) of the *Canada Pension Plan*. In doing so, the General Division erred in law by applying an inappropriately low threshold to summarily dismiss the appeal. In his written submissions to the General Division, the Claimant argued that the limit on retroactive pension payments denied him his fair share of contributions to the CPP and discriminated against him on the basis of his age. I will not make a finding on the merits of this argument except to note that Charter issues, particularly where equality rights are concerned, are highly complex and cannot be dismissed without at least some degree of informed analysis.

[19] The Claimant's Charter argument may have lacked sophistication but, in my view, it was not plain and obvious on the record that it was bound to fail.

REMEDY

[20] The Appeal Division can provide a remedy for errors committed by the General Division. I have the power to give the decision that the General Division should have given; to refer the

³ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

⁴ *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v Canada (Attorney General)*, 2004 FCA 264.

matter back to the General Division for reconsideration in accordance with directions; or to confirm, rescind, or vary the General Division's decision.⁵

[21] The Appeal Division is required to conduct proceedings as quickly as circumstances and considerations of fairness allow but, in this case, I feel my only option is to return this matter to the General Division for another hearing, subject to direction.

[22] I do not think that the record is complete enough to allow me to decide this matter on its merits. The General Division's decision to summarily dismiss the Claimant's appeal closed off the potential for additional submissions—including oral argument—that, if they had been considered, might have produced a different outcome. Unlike the Appeal Division, the General Division's primary mandate is to hear evidence and make findings of fact. As such, it is better positioned than I am to assess the Claimant's challenge under the Charter of the CPP's restrictions on retroactive payment.

CONCLUSION

[23] For the reasons discussed above, I am allowing this appeal because the General Division (i) breached a principle of natural justice by failing to consider the Claimant's Charter argument and (ii) erred in law by inappropriately disposing of his appeal by way of summary dismissal.

[24] This matter will be returned to the General Division for a new hearing (i) to determine whether the Claimant has met the requirements to make Charter arguments under section 20(1)(a) of the SSTR and, if so, (ii) to hear those arguments and make findings on them.



Member, Appeal Division

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| METHOD OF PROCEEDING: | On the record |
| REPRESENTATIVE: | G. F., self-represented |

⁵ DESDA, section 59(1).

