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

Citation: *JL v Minister of Employment and Social Development*, 2021 SST 163

Tribunal File Number: AD-20-844

BETWEEN:

J. L.

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 27, 2021

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant was formerly a recipient of the Canada Pension Plan (CPP) disability pension. When he turned 65 in November 2018, the Minister stopped the disability pension and began paying him a retirement pension the following month. The amount of the retirement pension was less than what the Claimant had been receiving as a disability pension. The Claimant asked the Minister to reconsider the change, but the Minister maintained that the amount was correct. The Claimant appealed to the General Division of the Social Security Tribunal.

[3] The General Division notified the Claimant in writing that it intended to summarily dismiss his appeal and gave him until August 4, 2020 to provide reasons why it should not do so. The Claimant never responded to the notice.

[4] In a decision dated August 7, 2020, the General Division summarily dismissed the Claimant's appeal because it was not satisfied that the appeal had a reasonable chance of success.

[5] The Claimant is now appealing the summary dismissal to the Tribunal's Appeal Division for the following reasons:[1]

- He disagrees with the General Division's decision to dismiss his claim;
- Service Canada and Canada Revenue Agency (CRA) subjected him to discriminatory treatment by withholding information required to properly calculate his pension;[2]

[1] See Claimant's submissions dated November 24, 2020 (AD1) and January 12, 2021 (AD3).
[2] Letter from CRA to Claimant dated October 19, 2018 stating that income tax information prior to 1980 is no longer available; correspondence between Service Canada and the Claimant dated September 24, 2018, April 16, 2019, and November 14, 2019.

- The General Division also subjected him to discriminatory treatment by refusing to consider evidence that Service Canada and CRA had mistreated him;
- The General Division did not take account case law that he had submitted to its attention; and
- The General Division dismissed his appeal, despite the fact that he had "illness and communication problems" due to COVID-19 and was thus unable to respond to its requests for information within the specified timeline.

[6] At my request, the parties held a pre-hearing conference in a bid to define and prioritize the issues.[3] At the conference, I identified two other issues that I thought were worth discussing:

- Whether the General Division used the appropriate mechanism to dispose of the Claimant's appeal; and
- Whether the Minister considered the Claimant's request to rectify his record of earnings (ROE) in a judicial manner.

[7] The hearing proceeded by teleconference because I thought the Claimant deserved an opportunity to make his case orally. I also thought that the format was fairest, quickest, and most informal way to proceed under the circumstances.

ISSUES

[8] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[4]

[9] The issues before me are as follows:

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

Issue 2: Do any of the Claimant's allegations have merit?

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[3] Held on February 17, 2021.
[4] The formal wording for these grounds of appeal is found in s 58(1) of the *Department of Employment and Social Development Act* (DESDA).

Issue 3: Did the General Division consider whether the Minister's refusal to rectify the ROE was made a judicial manner?

ANALYSIS

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

[10] I am satisfied that the General Division used the appropriate mechanism to dispose of the Appellant's appeal. In paragraph 3 of its decision, the General Division correctly cited the provision that permits it to summarily dismiss an appeal that has no reasonable chance of success.[5] However, I acknowledge that it is insufficient to simply cite legislation without properly applying it to the facts.

[11] 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 a case called *Fancy*,[6] the Federal Court of Appeal determined that a reasonable chance of success is akin to an arguable case at law. The Court also determined that the threshold for summary dismissal is high.[7] 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.

[12] In this case, the Claimant's CPP disability pension was converted into a retirement pension when he turned 65. Since this is just what section 70 of the *Canada Pension Plan* requires, the General Division correctly applied a high threshold when it found that the appeal had "no reasonable chance of success." For reasons that I will explain below, it was plain and obvious that the Claimant's arguments were bound to fail.

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[5] DESDA, s 53(1).
[6] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[7] *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.

Issue 2: Do any of the Claimant's allegations have merit?

[13] I have reviewed the record and considered the Claimant's written submissions. I have concluded that none of the Claimant's reasons for appealing justify overturning the General Division's decision.

Disagreement with the General Division is not a permitted ground of appeal

[14] To succeed at the Appeal Division, a claimant must do more than simply disagree with the General Division. A claimant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the three grounds of appeal permitted under the law.

[15] In this case, I see no indication that the General Division ignored relevant evidence or misconstrued the applicable law. The fact that the Claimant has a permanent disability does not give the General Division the power to change when his disability pension ends.

[16] The *Canada Pension Plan* is clear. Section 70(1)(a) says that persons can no longer receive a disability pension after they turn 65. When that happens, they are deemed under section 70(2) to have applied for a retirement pension. That is why the Claimant's disability pension ended in November 2018 and why his retirement pension started the next month. This was the General Division's analysis, and I see no reason to second-guess it.

[17] An appeal to the Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different outcome. While the General Division did not arrive at the conclusion that the Claimant would have preferred, I cannot, as a member of the Appeal Division, reassess the evidence and make my own determination of his earnings and contributions.

The General Division already considered the Claimant's allegations of discrimination

[18] The Claimant is convinced that two federal government agencies have negligently failed to record some of his CPP contributions over the years. Service Canada has provided him with an ROE, going back to 1971, that he believes is incomplete or wrong. CRA has told him that it has no more information for selected years in which he insists he had more income. At the

General Division, the Claimant argued that the government is discriminating against him by refusing to acknowledge what he claims are missing earnings.

[19] As mentioned, the Appeal Division is not a place to re-litigate matters that the General Division has already heard. The General Division dismissed this argument, and I do not see how it erred in doing so.

[20] The Claimant has not received the answers that he wanted or expected, but that does not make him a victim of unequal treatment. At both the General Division and the Appeal Division, he has not explained how the law is unfair. He has not described a potential violation of his Charter rights. He has not identified any instances of bias or discrimination.

The General Division itself did not discriminate against the Claimant

[21] When it decided that the Claimant's appeal did not have a reasonable chance of success, the General Division weighed the evidence, made findings of fact based on that evidence, and applied those facts to the relevant law. I see nothing to suggest that the General Division made an error. I see no indication that the General Division gave the Minister preferential treatment.

[22] The General Division found nothing to suggest that the Claimant's retirement pension had been calculated incorrectly. In doing so, the General Division noted that

(i) the Minister calculated the Claimant's retirement pension using figures in his ROE;

(ii) the Minister verified with CRA that the figures in the ROE were correct;[8] and

(iii) the Minister was entitled to presume that the ROE was correct four years after the last entry.[9]

[8] Under s 26.1 of the CPP, the Claimant had the right to ask CRA to rule on pensionable earnings, subject to time limitations. The Minister had a similar right, but without limitations, and it appears that it exercised that right when it requested information about the Claimant's earnings and contributions from CRA on February 26, 2019 (GD2-10). The Claimant had the right to appeal that ruling under s 27, but that 90-day time limitation has since elapsed.
[9] See *Canada Pension Plan*, s 97(1).

[23] The General Division is entitled to some leeway in how it chooses to weigh the evidence. The Claimant maintains that his ROE does not show the true extent of his earnings in the 1970s but he has never offered any proof that the government's numbers are wrong.

The General Division is presumed to have considered all the material before it

[24] The Claimant alleges that the General Division failed to consider a case that supported his claim that his retirement pension was too low. The Claimant did not specify the case that the General Division supposedly ignored, but it appears to be a General Division case called *S.A.*,[10] which he submitted to the General Division's attention in January 2019.

[25] I do not see any merit in this allegation. A decision-maker is presumed to have considered all the material before it, and its written reasons can't be expected to address each and every item in the record. As it happens, the General Division had good reason not to spend any time addressing *S.A.*: the case seems to be completely irrelevant to the case that the Claimant is trying to make. The Claimant has been attempting to get, first CRA, then Service Canada, later the General Division, to recognize additional earnings and contributions in an effort to increase the amount of his monthly CPP retirement pension. By contrast, *S.A.* involves competing claims for a completely different benefit (the Old Age Security Allowance), one for which CPP earnings and contribution thresholds have no bearing.

Illness did not prevent the Claimant from responding to the General Division

[26] The Claimant alleges that the General Division issued its decision before he had a chance to respond to its request for information. He suggests that the COVID-19 pandemic interfered with his ability to reply.

[27] I am not convinced that the Claimant was treated unfairly. When the Claimant filed his notice of appeal with the General Division, he authorized the Tribunal to communicate with him by email.[11] On June 24, 2020, the General Division notified the Claimant that it intended to summarily dismiss his appeal. The notice, which was sent as a PDF attachment to the Claimant's

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[10] *S.A. v Minister of Employment and Social Development*, 2017 SSTGDIS 4, included in the Claimant's submission of January 23, 2019, GD3-10.
[11] Claimant's notice of appeal to the General Division dated April 9, 2019, GD1-6.

authorized email address, set a deadline of August 4, 2020 for further submissions. The General Division had not received any submissions from the Claimant by the specified deadline, and it issued a decision three days later.

[28] I am satisfied that the Claimant did receive the General Division's notice. It was sent to an email address that the Claimant himself had provided and had used to communicate with the Tribunal several times in the past. The notice gave the Claimant six weeks to file submissions. The Claimant could have asked the General Division for an extension, but he did not.

[29] The Claimant testified that he became seriously ill in July 2020. He also said that his computer hard drive malfunctioned around the same time. He said that he was unable to get a replacement until October, after he had recovered. He said that he had no access to computers in public libraries, which were closed because of the pandemic.

[30] I found this story unlikely. The Claimant said that he did not become ill until July 2020, but the General Division's notice of intention to summarily dismiss was sent in late June. He has not provided any medical evidence that he contracted COVID-19 or any other illness. He has not shown that, if he was in fact ill, he had symptoms that prevented him from communicating with the Tribunal. In June 2020, the Claimant informed the Tribunal that he was ready for the General Division to proceed with his appeal. He therefore knew, or should have known, that his file would be dealt with imminently. Nothing prevented him from telephoning the Tribunal to inquire about the status of his file, but the record shows that he did not contact the Tribunal until mid-November.

Issue 3: Did the General Division consider whether the Minister refused to rectify the ROE in a judicial manner?

[31] Finally, I looked at how the General Division addressed the Minister's response to the Claimant's request to rectify his ROE. When someone asks the government for something, the Minister must decide what to do in a judicial manner. That means it must take the request seriously and weigh relevant information in attempt to come to a fair decision. This holds true for discretionary decisions just as much as it does for nondiscretionary decisions.[12] The courts

[12] Discretionary decisions are decisions that the Minister **can** make under the law. Nondiscretionary decisions are decisions that the Minister **must** make.

have held that discretionary decisions must be made (i) in good faith; (ii) without improper purpose or motive; (iii) with regard for relevant factors; (iv) without regard for irrelevant factors; and (v) without discrimination.[13]

[32] Among the Minister's discretionary powers is the authority to rectify an ROE if it is satisfied that a claimant's earnings are less than what they should be.[14] The General Division did not address whether the Minister's refusal to rectify the Claimant's ROE was made judicially. However, I note that the Minister did not dismiss the Claimant's request simply because it was about things that happened more than 40 years ago. Instead, it made its own inquiry into the Claimant's earnings by asking CRA to double check its records.[15] The CRA responded as it had to the Claimant—that it had no information to contradict the ROE. In my view, the Minister gave serious consideration to the Claimant's request, and I see nothing to suggest that it made its decision in anything less than a judicial manner.

[33] As held in *Canada v Tucker*[16] and many other cases, an administrative tribunal, such as the General Division, has no power to review discretionary Ministerial decisions. The General Division correctly determined that it had no authority to order an adjustment to the ROE itself: "I do not have authority to direct the Minister to make a revision. Even if I did, I would not. There is no evidence that one should be made."[17] This statement corresponds to the law, but it also reflects the fact that the Claimant was ultimately unable to prove that his ROE was incorrect.

CONCLUSION

[34] The Claimant has not shown that the General Division treated him unfairly or that it made an error in determining that the Minister calculated his retirement pension correctly.

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[13] *Canada (Attorney General) v Purcell*, [1996] 1 FCR 644.
[14] See s 97(2) of the *Canada Pension Plan*.
[15] See Service Canada CPP earnings and contributions request form dated March 25, 2019, GD2-9.
[16] *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.
[17] General Division decision, para 8.

[35] The appeal is therefore dismissed.

Member, Appeal Division

HEARING DATE:	April 26, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. L., Claimant Samaneh Frounchi, representative for the Minister