Citation: *LB v Minister of Employment and Social Development*, 2021 SST 773

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	L. B.
Respondent:	Minister of Employment and Social Development
Representative:	Rebekah Ferriss

Decision under appeal:	General Division decision dated August 10, 2021 (GP-21-632)

Tribunal member:	Kate Sellar
Type of hearing:	On the Record
Decision date:	December 17, 2021
File number:	AD-21-277

Decision

[1] I am allowing the appeal. The General Division made several errors by summarily dismissing the Claimant's appeal. The matter will go back to the General Division for a hearing.

Overview

[2] L. B. (Claimant) received a retirement pension under the *Canada Pension Plan* (CPP) starting in January 2013. In June 2020, after her husband died, she applied for the CPP survivor's pension. The Minister approved that application in December 2020. The Minister decided that she was entitled to a combined monthly CPP survivor/retirement pension of $790.25, effective January 2021.

[3] The Claimant appealed to the General Division of this Tribunal. The Claimant argued that the calculation of the combined pension (specifically the retirement component) was not correct. The General Division dismissed the appeal without a hearing (a summary dismissal). The General Division found that the Claimant's appeal had no reasonable chance of success because:

- the Minister calculated the pension according to the required formula in the CPP, and
- the Federal Court stated that all the matters pertaining to the Claimant's retirement pension were finally decided, and General Division could not decide otherwise.[1]

[4] I must decide whether the General Division made any errors by summarily dismissing the appeal. If there are errors, I need to decide what I will do to remedy (fix) them.

[5] In my view, the General Division made several errors by summarily dismissing the appeal. The General Division made an error of fact, and errors of law. The General

[1] General Division decision, paragraphs 9 and 11.

Division ignored some evidence about the federal court proceedings about the Claimant's pension. The General Division also relied on two key conclusions to dismiss the appeal without a hearing. The reasons to support those conclusions do not sufficiently explain the path to the result (that the Claimant's appeal was bound to fail regardless of what evidence or arguments she might have provided at a hearing).

Issues

[6] The issues in this appeal are:

a) Did the General Division make an error of fact by summarily dismissing the appeal without grappling with the evidence the Claimant gave about the pension cases she had at the federal courts?

b) Did the General Division make an error of law by summarily dismissing the appeal without sufficient reasons to support the conclusion that they were bound by the Federal Court's description of the pension issues as "finally decided"?

c) Did the General Division make an error of law by summarily dismissing the appeal without sufficient reasons to address the specific issue the Claimant raised about the accuracy of the pension calculation?

Analysis

[7] To understand the errors the General Division made, I need to address first the role I play on the Appeal Division in reviewing General Division decisions, and the role the General Division played when it summarily dismissed the appeal.

– Reviewing General Division Decisions

[8] The Appeal Division does not give the Claimant and the Minister a chance to re-argue the case from the beginning. Instead, the Appeal Division reviews the General Division's decision to decide if it contains errors.

[9] There are three types of errors that the Appeal Division can address:

- errors of fact,
- errors of law, and
- errors made because the General Division did not provide a fair process (or made an error relating to the powers that it has).[2]

– Summary Dismissal

[10] The General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success. The issue is whether it is plain and obvious on the record that the appeal is bound to fail.[3]

[11] The question that the General Division considers is **not** whether the Tribunal must dismiss the appeal after considering the facts, the case law, and the parties' arguments. Instead, the question is whether the appeal is destined to fail regardless of the evidence or arguments that the claimant might provide at a hearing.[4]

– Error of Fact: Ignoring the Claimant's evidence about the Federal Court order

[12] The General Division made an error of fact by ignoring some of the Claimant's evidence about the Federal Court order.

[13] The General Division wrote to the Claimant to warn her that it was considering summarily dismissing the appeal. The General Division sent a notice to the Claimant allowing her to make arguments about why the General Division should not dismiss her appeal without a hearing.[5]

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[2] *Department of Employment and Social Development Act*, section 58(1).
[3] DESDA, s 53(1); see also the Federal Court's decision in *Miter v Canada (Attorney General)*, 2017 FC 262.
[4] The Tribunal explained this in a case called *AZ v Minister of Employment and Social Development*, 2018 SST 298.
[5] GD4-1.

[14] The General Division decision states that in response to the notice, the Claimant "reiterated the same submission that she made in her Notice of Appeal, namely, that an error was made when her CPP retirement pension was calculated."[6]

[15] Contrary to the General Division decision, in response to the notice, the Claimant actually did make arguments and give evidence that went beyond the question about the way the Minister calculated the pension.[7] In response to the notice, the Claimant provided a Federal Court order as well as some information and context for the Federal Court order.

[16] She explained that she had a case (judicial review) at the Federal Court of Appeal that she argues dealt only with the contributory period for her retirement pension calculation. After she received that decision, she filed a request for an extension of time to the Federal Court, which was a mistake based on some bad advice. She made it clear that she did not agree with the Minister's submissions to the Federal Court characterizing the issue at the Federal Court of Appeal as being any broader than just addressing her contributory period.[8]

[17] The Federal Court did not decide the motion in the Claimant's favour. The Federal Court found that her motion was a collateral attack on a previous Federal Court of Appeal decision. The Federal Court stated that it did not have the power (jurisdiction) to grant a judicial review.

[18] One of the recitals in the order stated that all matters pertaining to the Claimant's pension had been finally decided. Recitals are statements that begin with the word "whereas" in some legal documents. They provide the backstory to the court's order.

[19] The General Division did not engage with the arguments the Claimant made about the Federal Court order before reaching a decision on summary dismissal. If the Claimant's appeal was bound to fail because of what the Federal Court order stated in the recitals about the pension issues being finally decided, the General Division needed

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[6] General Division decision, paragraph 10. The Claimant's response to the Tribunal's notice is GD6.
[7] GD6-2.
[8] GD6-2.

to grapple with the evidence and arguments that the Claimant provided about the context for the Federal Court's order.

[20] The General Division does not need to refer to every piece of evidence in its decisions. However, if the evidence is important enough, the General Division needs to discuss it. [9]

[21] The General Division did not discuss the evidence from the Claimant about how the Federal Court order came about and what the Federal Court of Appeal decision covered. It was important given the focus the General Division put on the Federal Court order in deciding the Claimant's appeal was bound to fail. The General Division simply relied on the idea that the Federal Court had already decided that, "all matters pertaining to the Claimant's pension have been finally decided."[10] The General Division found that it is "bound" by decisions of the Federal Court, and cannot decide "otherwise."

[22] The General Division characterized the Claimant's response to the notice about summary dismissal as being just more of the same arguments about the calculations, but there was more in the response than that. I infer that the General Division ignored what the Claimant argued about the order. This evidence was important and the General Division should have discussed it.

– **Insufficient Reasons: bound by the Federal Court order**

[23] The General Division made an error by summarily dismissing the case because it believed it was "bound" by the Federal Court order. The General Division did not give sufficient reasons to support that conclusion, which is an error of law.

[24] Failing to provide reasons on a key issue in a case can be an error of law.[11] It was not plain and obvious on the record that the Claimant's arguments about the

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[9] The Federal Court of Appeal explained this in *Simpson v Canada (Attorney General)*, 2012 FCA 82 and *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.
[10] GD6-11.
[11] *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292 talks about the role that reasons play in social security appeals.

calculation were bound to fail simply because of the recital in the Federal Court order. On its face, the Federal Court order was really about jurisdiction – the Federal Court could not review a Federal Court of Appeal decision and could not be used to as a way to attack that decision.

[25] The part of the order that describes the Claimant's pension issues as "finally decided" is in the recitals. The idea that the background information described in all of those sections of this order about an extension of time are "binding" does not seem to me to be plain and obvious.

[26] It is not clear from the reasons in what way the General Division considered itself bound by the Federal Court order. For example, it may be that the General Division meant to summarily dismiss the appeal because it was applying the rule that it cannot decide a matter that has already been decided (I will simply refer to it as the rule).[12]

[27] If that is the case, the General Division did not provide sufficient reasons for applying the rule. Applying that rule in this case requires explaining and reaching conclusions not only that the issue and the parties were the same as they were in the previous proceeding, but also that the order was final.[13] The decisions does not contain any analysis about whether the issues and the parties were the same.

[28] Even then, applying the rule is still a choice – also called a matter of discretion. The purpose of the rule is to promote the orderly administration of justice, but not at the cost of real injustice in the particular case. So before applying the rule, the decision maker needs to consider whether it might cause injustice.[14]

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[12] In Latin, the rule is called *res judicata*.
[13] The Supreme Court of Canada explained the rule and how to apply it in a case called *Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44. The Federal Court in *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100 stated that the rule against deciding cases that have already been decided applies at the Social Security Tribunal.
[14] There are factors to consider when applying the rule. They include things like: the wording of the statute (where the power to give the decision comes from); the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the procedure; the expertise of the prior decision-maker; the circumstances giving rise to the first proceedings; and any potential injustice.

[29] There are some factors to think about when deciding whether applying the rule would result in injustice. For example, what are the circumstances giving rise to the proceeding at the Federal Court? What are the safeguards available to the parties in that procedure?[15] The General Division may have applied the rule as though the Claimant was bound to fail without considering the factors at all.

[30] If the General Division was applying the rule, the reasons for applying is were not sufficient (particularly in light of the need to consider whether the General Division should apply the rule at all).

[31] It was not plain and obvious that all matters related to the Claimant's pension were finally resolved. The Federal Court order stated that in the recitals, but there is an argument to be made that the Federal Court was relying on the a Federal Court of Appeal decision that focussed much more narrowly on one issue about the Claimant's retirement pension (the number of months in her contributory period).[16]

[32] The Minister argues that although the final decision from the Federal Court of Appeal did not address the calculations explicitly, it was alive to the issues and they were resolved.[17] These are the kinds of arguments that are resolved through a hearing followed by reasons that address the arguments. In my view, none of this is plain and obvious.

– **Insufficient Reasons: Calculation in accordance with the formula**

[33] The General Division concluded that the Minister calculated the pension according to the formula required in law. It is not clear to me from their reasons what conclusion the General Division drew about the specific calculation the Claimant provided in her initial appeal.

[34] The General Division concluded that the Minister used the correct formula in the CPP given the Claimant's age and when she began to receive her retirement pension.

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[15] These are some of the factors to consider that the Supreme Courts talks about in *Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44, paras 67-80.
[16] The Federal Court of Appeal decision is *Bartlett v Attorney General of Canada*, 2018 FCA 165.
[17] AD7-4.

However, General Division decision does not seem to have wrestled with the specific calculation issues that the Claimant raised at the General Division level.[18]

[35] For example, it seems that the Claimant had a specific calculation for the retirement benefit component of her combined pension that then affected the rest of the combined calculation. She argued that the $394.45 as the CPP retirement benefit (then escalated to $439.91) was not correct. She argued that the Minister should not use the earnings portion of a disability pension to calculate a CPP retirement pension.[19]

[36] The General Division seems to have agreed with the way the formula works for combining the pensions. However, it is not clear to me that the General Division considered whether that $439.91 number that the Minister plugged into the formula was correct in the Claimant's case. The lack of a discussion about the differences in the parties' arguments about the calculations is an error of law.

[37] Given that:

- the General Division said that it is bound by the Federal Court order recital stating that all matters related to the Claimant's pension are settled, and
- the General Division's reasons are not responsive to the question,

I will not infer that the General Division considered and dismissed all of the Claimant's position on the calculations.

[18] The Claimant raised different and additional calculation issues at the Appeal Division. A summary of those issues and how they evolved at the AD level from the Minister's perspective is set out in AD7-4 and 5. A record of some of the evolution of the calculation issues at the AD level is set out in AD1B and AD1C.
[19] GD6-12.

Fixing the Error

[38] The General Division made several errors by summarily dismissing the Claimant's appeal. To fix the errors, I will return the case to the General Division for reconsideration.[20] The Claimant will have a hearing.

[39] The Minister argues that if I find the General Division made an error, I should return the matter to the General Division so that it the General Division can decide the appeal based on a full record.

[40] I agree. In my view, returning the case to the General Division is the right fix given that the decision on appeal was a summary dismissal. The Claimant should have a chance to have some type of hearing on the issues she is raising about her combined retirement/survivor's pension.

[41] When the matter returns to the General Division for a hearing, the parties may request to make arguments about the calculations, including the Claimant's most recent submission about the calculation that she made at the Appeal Division, which the Minister has perhaps not yet addressed squarely in their arguments.[21]

Conclusion

[42] I allowed the appeal. The General Division made errors in summarily dismissing the appeal. The case will return to the General Division for a hearing.

Kate Sellar

Member, Appeal Division

[20] My authority to return the case to the General Division once I have found an error comes from the DESD Act, s 59.
[21] Claimant's calculation arguments at AD5 and AD6, and the Respondent's arguments at AD7.