Citation: ***E. N. v. Minister of Employment and Social Development*****, 2015 SSTAD 1294**

Date: November 6, 2015

File number: AD-15-3

APPEAL DIVISION

Between:

E. N.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Heard In person on October 30, 2015, Winnipeg, Manitoba

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	E. N.
Counsel for the Appellant	Norman Rosenbaum
Counsel for the Respondent	Hasan Junaid
Interpreters	Penny Schincariol Angela Tippett Jeanette Nicholson

INTRODUCTION

[1] The Appellant claimed that he was disabled as a result of injuries sustained in a motor vehicle accident when he applied for a *Canada Pension Plan* disability pension. The Respondent denied his claim initially and after reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. In September 1999 a Review Tribunal dismissed the appeal.

[2] On June 14, 2010 the Appellant's doctor wrote to the Office of the Commissioner of Review Tribunals with information regarding his mental health. The Office of the Commissioner of Review Tribunals deemed this letter to be an application to rescind or amend the 1999 decision based on new facts pursuant to subsection 84(2) of the *Canada Pension Plan* (as it then read). The matter was not heard before the Office of the Commissioner of Review Tribunals completed its mandate. The matter was transferred to the General Division of the Social Security Tribunal on April 1, 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. On December 9, 2014 the General Division dismissed the application to rescind or amend the 1999 decision on the basis that the claim was statute-barred.

[3] The Appellant requested leave to appeal the General Division decision. Leave to appeal was granted on the basis that legal doctrines may apply to permit the appeal to continue.

[4] The Appellant argued that his claim should not be statute -barred for a number of reasons, including that the General Division should not have dismissed his claim without first hearing evidence on the merits of the claim, that the doctrines of discoverability and special circumstances applied, and that interpreting the legislation so that the claim was statute-barred leads to absurd results. In contrast, the Respondent submitted that although the result may be harsh, the legislation was clear and its application to the facts of this case require that the claim be dismissed, and that there was no need to look to any legal doctrines in the face of this clear legislation.

[5] I must decide if the Appellant's claim to request that the 1999 Review Tribunal decision be reopened on the basis of new facts is statute-barred by the *Department of Employment and Social Development Act*, and the *Jobs, Growth and Long-term Prosperity Act* (JGLTPA). The relevant sections of these Acts are reproduced in the Appendix to this decision.

[6] This appeal was heard in person after considering the following:

a) The complexity of the issue(s) under appeal.

b) The fact that multiple participants such as witness and/or a third party may be present.

c) The form of hearing provides for any special accommodations required by the parties.

STANDARD OF REVIEW

[7] Counsel for both parties agreed that the standard of review to be applied to the General Division decision in this matter is that of correctness as the appeal involves a pure question of law. The Court has not yet set out specifically what standard of review is to be applied by the Appeal Division of the Tribunal to a decision of the General Division. The leading case on the issue of standard of review is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal's own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of

possible, acceptable outcomes which are defensible on the facts and the law. The correctness standard of review is to be applied to questions of jurisdiction, and questions of law that are of importance to the legal system as a whole and outside the adjudicator's specialized area of expertise. This reasoning was adopted by the Federal Court of Appeal in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 which was a *Canada Pension Plan* (CPP) disability pension claim.

[8] The Respondent submitted that the Appeal Division was modelled after the former Employment Insurance Umpires, which applied the standard of correctness to questions of law (see *Stone v. Canada (Attorney General)*, 2006 FCA 27.

[9] For the reasons set out below, I am satisfied that the General Division decision was both unreasonable and incorrect. Therefore, I need not determine whether the standard of review is correctness or reasonableness in this matter.

ANALYSIS

[10] The parties presented numerous arguments to support their position in this matter. They are dealt with below.

The Decision to Dismiss the Claim was Premature

[11] The first argument presented by the Appellant was that the General Division decision to dismiss his claim was premature. It was made prior to any evidence regarding his mental health (the basis for the new facts claim) being presented, or considered by the Tribunal. He contended that the General Division should have heard and considered the evidence regarding the new facts, and then determined both if the claim was barred from continuing by the statute and if he had met the legal test to establish that he had presented new facts as that term has been defined in the context of a CPP claim. The Respondent did not respond to this argument.

[12] I understand that the Appellant would have preferred to have presented his entire case to the General Division prior to any decision being made. The *Social Security Tribunal Regulations* provide, however, that matters are to be dealt with as quickly and informally as the circumstances and the consideration of fairness and natural justice permit. In light of this, it is

reasonable for the General Division to dismiss claims that cannot proceed as they do not meet the requirements to be able to do so.

[13] The Appellant also argued that the Appellant was not given any advance notice that his legal right to pursue his claim would be terminated. In fact, it was not until more than a year after the Social Security Tribunal began its mandate that the Appellant was advised that his claim would be dismissed because it was statute-barred. The law is settled that Parliament is able to terminate rights at any time provided this is done by enacting legislation that is clear. Certainly the Social Security Tribunal is under no obligation to advise parties of their rights, or when they might be terminated.

Presumption Against Interfering with Rights

[14] Neither party made submissions regarding the presumption that legislation is not to interfere with rights that accrued under a prior enactment that was repealed. However, this must be considered in reaching the decision in this matter.

[15] Paragraph 43(c) of the *Interpretation Act* provides that when an enactment is repealed, the repeal does not affect any right that accrued under the enactment so repealed. In this case, subsection 84(2) of the CPP granted a right to seek to have a prior Review Tribunal decision reopened on the basis of new facts. Paragraph 44(c) of the *Interpretation Act* provides that a proceeding taken under a former enactment shall be continued under the new enactment in so far as it may be done consistently with the new enactment.

[16] Upon a review of these provisions, it is clear to me that insofar as possible the Social Security Tribunal should adjudicate claims that were validly commenced under subsection 84(2) of the CPP. If this is not done, the actions of the Tribunal contravene sections 43 and 44 of the *Interpretation Act* and the presumption against interfering with rights.

[17] Also, the purpose of section 261 of the JGLTPA was to ensure that the Social Security Tribunal had authority to adjudicate proceedings that began but were not completed prior to its mandate. To interpret the JGLTPA and DESD Act to terminate rights to continue such claims interferes with these vested rights.

The Result was Absurd

[18] The Appellant argued that the application of the *Department of Employment and Social Development Act* (DESD Act) to this matter as suggested by the Respondent results in absurdity. The Appellant properly engaged the hearing process by bringing the application for the 1999 decision to be rescinded or amended. He had a vested right to prosecute this claim, and was doing so. It is absurd to terminate the Appellant's right to pursue his claim "in midstream".

[19] In addition, the Appellant argued that the transitional provisions of the JGLTPA were designed to ensure that the Social Security Tribunal had jurisdiction to decide the appeals that were transferred to it. The elimination of the Appellant's claim simply because he had not had a hearing before a particular date is an absurd result.

[20] I accept that legislation is not to be interpreted to generate absurd results. I am also satisfied that the Respondent's interpretation of section 66 of the DESD Act leads to an absurd result in this case. The Appellant was told that he had a claim that could proceed. When his claim was transferred to the Social Security Tribunal in April 2013 he had done all that was required of him to prosecute his claim. The matter had not been heard on its merits for reasons totally beyond his control.

[21] In addition, I agree with the argument put forward by counsel for the Appellant that the purpose of section 261 of the JGLTPA was to ensure that the Social Security Tribunal had proper jurisdiction to decide matters that had not been completed by the prior tribunals. Section 261 gives the Social Security Tribunal this jurisdiction. It is absurd to interpret this same section of the same Act to also terminate the right of an Appellant to pursue this claim.

Statutory Construction

[22] Counsel for the Respondent relied on the decision of the Federal Court in *Tabingo v. Canada (Minister of Citizenship and Immigration)* 2013 FC 377 to support its argument that Parliament can terminate existing rights by passing legislation that clearly does this. I note, however, that in that case, the legislation terminating rights in the immigration context set a date in the future when rights would cease. While I agree that Parliament can terminate rights

by enacting legislation that clearly does so, I am not persuaded that the facts of the *Tabingo* case are in any way similar to the one before me. In this case, the Appellant's medical letter was accepted as an application to have the 1999 decision rescinded or amended. The Appellant was not required to take any further steps to prosecute his claim. He was not notified in advance that his legal right to pursue this claim or have it decided on the merits would cease to exist. Accordingly, I place little weight on this decision.

[23] Counsel for the Respondent also argued that the DESD Act sets out a comprehensive scheme for decision making regarding CPP disability pension claims. As such, there is no need, nor any obligation, to consider doctrines of statutory construction such as the doctrines of discoverability or of special circumstances. The Appellant argued that the DESD Act does not provide a comprehensive scheme for this. CPP disability pension claims are to be decided based on the legislation and the enormous body of case law that has been developed in this area. I agree with the Appellant. This conclusion is strengthened by a review of the *Social Security Tribunal Regulations*, which provide specifically in subsection 3(2) that if a question of procedure arises that is not dealt with by the Regulations, the Tribunal must proceed by way of analogy to the Regulations. Clearly, this contemplates that the DESD Act did not set out a comprehensive scheme for deciding matters brought before the Social Security Tribunal.

[24] Counsel for the Respondent also referred to scholarly writings that confirmed that legislation is paramount to the common law, and resort should not be had to common law doctrines if the legislation is clear. He argued that the law is clear, and that the plain and obvious meaning of section 261 of the JGLTPA and section 66 of the DESD Act is that applications to reopen a prior decision that were made more than one year after the decision was communicated to the claimant, and then deemed to be made on April 1, 2013 by the JGLTPA are barred from continuing because of the statutory provisions.

[25] With respect, I do not agree that the legislation is clear. Neither the DESD Act nor the JGLTPA clearly state that existing claims, which were legally commenced under legislation that was in force when they were commenced, will be extinguished on a particular date for no reason other than that the Tribunal that is to decide the matter has changed. The JGLTPA states that these claims are to be continued under the DESD Act. The DESD Act sets out how these

claims are to proceed, and at the same time purports to terminate the right to prosecute the claim. This is contradictory, and hence unclear.

[26] The Appellant further argued that the DESD Act is not clear. It is not “sealed off from” the common law, and the legislation does not state that doctrines of statutory construction do not apply to cases before it. In fact, he argued that the statement that the DESD Act is a comprehensive scheme is itself an interpretation of this statute. Hence, doctrines of statutory construction must be considered. Parliament is also presumed to know the law (including the common law), and to know doctrines of statutory construction. As such, it is appropriate to look to these doctrines to assist in interpreting legislation.

[27] The Appellant specifically referred to the doctrine of discoverability which was examined at some length by the Supreme Court of Canada in *M.(K.) v. M.(H.)*, [1992] 3 SCR 6. In this decision the Supreme Court of Canada stated that a limitation period should not commence until a claimant knows or discovers that he has a claim that could be prosecuted. So, for example, a survivor of childhood sexual abuse may not be precluded from making a claim years after the abuse occurred if he did not discover that the abuse was the mechanism of his injury until that time. The Appellant argued that this doctrine of statutory construction applies in CPP disability pension claims as well, such as in this case where the Appellant did not discover that his disability may be causally connected to childhood sexual abuse until after the decision was made in 1999.

[28] For the same reasons, the Appellant argued that the doctrine of special circumstances can be applied in this matter. Both he and counsel for the Respondent relied on court decisions that concluded that this doctrine can be utilized to add claims or parties to litigation after the expiry of a limitation period. I agree.

[29] The Respondent contended that this doctrine cannot be relied on, however, to permit a claimant from beginning a legal action after the expiry of a limitation period (see *Joseph v. Paramount Canada’s Wonderland*, 2008 ONCA 469). The Respondent contended that the Appellant could not rely on the doctrine of special circumstances in this case because he wished to commence his claim after the time to do so had expired. With respect, I disagree with this argument. On the facts before me it is clear that the Appellant started his claim prior to the

expiry of any limitation period. There was no time limit to commence an application to rescind or amend a decision when he his doctor's letter was filed with the Office of the Commissioner of Review Tribunals and deemed to be an application to rescind or amend the 1999 decision. If it had not been properly commenced in 2010, it could not have been transferred to the Social Security Tribunal pursuant to the JGLTPA. Therefore, the matter at hand involves a claim that seeks to be continued or modified after the expiry of a limitation period and not one that seeks to be commenced after the limitation period had expired.

[30] The Appellant contended that the following were special circumstances in the matter at hand:

a) The fact that when the claim was started the Appellant was not represented and the Respondent was;

b) The fact that there may be a new mechanism of disability;

c) The fact that the Appellant received no advance notice that his right to prosecute his claim would be terminated; and

d) The fact that he was a victim of childhood sexual abuse and only after the 1999 decision realized that this might be the cause of his disability.

I am not persuaded that these factors are special circumstances as that term is contemplated. However, I am satisfied that the Respondent was aware of the claim by the Appellant, and had an opportunity to reply to it. The Appellant had done all that was required to prosecute this claim. There was no suggestion that the Respondent would be prejudiced in any way if the matter were to proceed. Hence, the requirements for this doctrine to be applied in this case have been met.

[31] Finally, in *S.M. v. Minister of Human Resources and Skills Development* (2014 SSTAD 214) my colleague decided that this Tribunal has the jurisdiction to consider and apply common law doctrines, and that the doctrine of special circumstances may apply to claims that may be statute-barred by section 66 of the DESD Act.

[32] For all of these reasons, I am persuaded that the Social Security Tribunal has the authority to apply common law doctrines of statutory interpretation, including doctrines that would permit this claim to be prosecuted despite the limitation period set out in section 66 of the DESD Act. I am satisfied that this doctrine applies in this case.

[33] Finally, the Appellant argued that the General Division erred as it did not consider any doctrines of statutory construction in reaching its decision. I agree. The decision clearly and correctly set out the relevant provisions of the CPP, the JGLTPA and the DESD Act. It did not, however, consider the presumption against interfering with rights, the presumption against absurdity, any doctrines of statutory construction, the relevant provisions of the *Interpretation Act*, or the relevant court decisions on the issue at hand. These were errors in law. This resulted in a decision that was both incorrect and unreasonable. It is not defensible on the facts and the law.

CONCLUSION

[34] The appeal is allowed for the reasons set out above.

[35] Section 59 of the DESD Act provides what remedies may be granted on an appeal. Both counsel at the start of the hearing before me agreed that if the appeal succeeded it was appropriate for the matter to be referred back to the General Division for a determination of the application to rescind or amend the decision on its merits. I agree that this is the appropriate remedy.

[36] This matter is referred to the General Division for a hearing on the merits of the application to rescind or amend the 1999 Review Tribunal decision.

[37] To avoid any potential apprehension of bias it should be referred to a different General Division Member.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

66. (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if

(a) in the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or

(b) in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

(2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.

Jobs, Growth and Long-term Prosperity Act

261. (1) If no decision has been made before April 1, 2013, in respect of a request made under subsection 84(2) of *the Canada Pension Plan*, as it read immediately before the coming into force of section 229, it is deemed to be an application made on April 1, 2013 under section 66 of the *Department of Human Resources and Skills Development Act* and is deemed to relate to a decision made, as the case may be, by

(a) the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal; or

(b) the Appeal Division of the Social Security Tribunal, in the case of a decision made by the Pension Appeals Board.

(2) An application made under section 66 of the *Department of Human Resources and Skills Development Act* after March 31, 2013 is deemed to relate to a decision made, as the case may be, by

(a) the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal; or

(b) the Appeal Division of the Social Security Tribunal, in the case of a decision made by the Pension Appeals Board.

Note: the *Department of Human Resources and Skills Development Act* is now called the *Department of Employment and Social Development Act.*