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

Citation: ***M. B. v. Minister of Employment and Social Development,*** **2016 SSTADIS 36**

Date: January 20, 2016

File number: AD-15-1261

APPEAL DIVISION

Between:

M. B.

Appellant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] This is an appeal against a decision of the General Division made pursuant to subsection 53(3) of the *Department of Employment and Social Development (DESD) Act.* The Appellant applied to convert her *Canada Pension Plan*, (CPP), retirement pension to a disability pension. The General Division, summarily, dismissed her appeal from the Respondent's denial of her application. The General Division held that as the Appellant did not become disabled before she started receiving the retirement pension, she could not cancel her retirement pension in favour of a disability pension.

[3] The Appellant appeals from the decision of the General Division.

GROUNDS OF THE APPEAL

[4] The Appellant requests an exception to the strict rules that govern the conversion of a CPP retirement pension to a disability benefit. She submitted that the severity of her health conditions and her personal circumstances warranted that the exception be made.

THE LAW

[5] As this is an appeal from a summary dismissal of an appeal the Appellant does not require leave to appeal from the Appeal Division of the Tribunal.[1]

[6] The law governing the conversion of a CPP retirement pension to a CPP disability pension is found at section 66.1 and section 66.1 (1.1) of the CPP. The provisions provide:

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[1] Per the DESD Act subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."
Subsection 56(2) Despite subsection (1) no leave is necessary in the case of an appeal brought under subsection 53(3) [summary dismissal by the General Division].

> ***66.1.*** *Request to cancel benefit* – (1) A beneficiary may, in prescribed manner and within the prescribed time interval after payment of a benefit has commenced request cancellation of that benefit.
>
> **(1.1)** *Exception* – subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an Appellant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the Appellant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable.

[7] The Application is also governed by 46.2. (1) of the *Social Security Tribunal Regulations*

(the Regulations), *S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 2,* namely,

> **(1)** A beneficiary may submit to the Minister, within the interval between the date of commencement of payment of the benefit and the expiration of six months after that date, a request in writing that the benefit be cancelled.

[8] Other statutory provisions that apply to this appeal include paragraph 44 (1)(b) of the CPP, which paragraph sets out the eligibility requirements for receipt of a CPP disability pension. Specifically, that in order for an applicant to qualify for a CPP disability pension, he or she must not be in receipt of a CPP retirement pension. The General Division noted that this requirement is also set out in subsection 70.1(3) of the CPP, namely, "once a beneficiary starts to receive a CPP retirement pension, that beneficiary cannot apply or re-apply, at any time, for a disability pension." However, the General Division also noted that subsection 66.1 of the CPP and subsection 46.2 of the *Canada Pension Plan Regulations* (CPP Regulations) provide exceptions to paragraph 44 (1)(b) and subsection 70.1 (3) of the CPP.

[9] For the purposes of this appeal it is paragraphs 44 (1)(b), and subsection 66.1(1) of the CPP and subsection 46.2 of the CPP Regulations that are important. Subsection 66.1(1) of the CPP allow a beneficiary to cancel a retirement pension in favour of a disability pension provided the Appellant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable. Therefore, where the Appellant became disabled prior to receiving a retirement pension, that retirement pension could not be cancelled in favour of a disability pension.

Furthermore, the Appellant has only a short 6month period in which to request the cancellation.

ISSUE

[10] The Appeal Division frames the issue in the following manner: Was it an error of law for the General Division to summarily dismiss the Appellant's appeal?

SUBMISSIONS

[11] Pursuant to section 36 of the Tribunal Regulations[2] the Tribunal invited the parties to make submissions. They were required to make their submissions no later than December 15, 2015. The Tribunal received submissions from the Respondent but not the Appellant. The Respondent took the position that the General Division had not erred either in its statement or its application of the relevant statutory provisions, thus, the Appeal Division had no basis to disturb the General Division decision and should dismiss the appeal.

The Test on a Decision to Dismiss an Appeal Summarily

[12] The test on a summary dismissal of an appeal is that the "appeal has no reasonable chance of success." The language of the applicable provision is in mandatory terms: the General Division must summarily dismiss an appeal if it is satisfied that it (the appeal) has no reasonable chance of success." The question is, of course, how does a decision-maker decide what amounts to a reasonable chance of success?

[13] Before deciding this question, the Appeal Division must decide how it will approach appeals of General Division decisions, generally, and this decision, specifically. Recent decisions of the Federal Court of Appeal and the Federal Court indicate that the Appeal Division is, likely, not required to engage in a "standard of review analysis." Instead, the Appeal Division ought to confine its inquiry to an assessment of whether or not the General Division breached any of the provisions of section 58(1) of the DESD Act. Thus, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 CAF 242 (CanLII),

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[2] *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s.236.*

2015 FCA 242, the Federal Court of Appeal drew a distinction between appeals heard pursuant to the transitional provisions of the *Jobs, Growth and Long-term Prosperity Act,* S.C. 2012, c. 19, ss. 266-267,and appeals from decisions rendered by the General Division of the Tribunal. The Federal Court of Appeal took the position that when the Appeal Division hears appeals under section 58 (1) of the DESD Act, the governing statute of the Tribunal, it needs must confine itself to the mandate provided by sections 55 to 69 of the Act:

> [19]… Where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act,* the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act. In particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" (paragraph 58(1)(b) of the *Act).* There is no need to add to this wording the case law that has developed on judicial review.

[14] The Federal Court of Appeal returned to the question in *Maunder v. Canada (Attorney General),* 2015 FCA 274, affirming the position it set out in *Jean Paradis.* In *Tracey v. Canada (Attorney General)* 2015 FC 1300 the Federal Court addressed the question in the context of applications for leave to appeal decisions of the General Division. As with the prior Federal Court of Appeal decisions, the Federal Court observed that the scope of the Appeal Division's jurisdiction when determining whether to grant leave to appeal has now been codified and set out in the DESD Act. Roussel, J. wrote:

> "in contrast with the former scheme which was grounded in common law through jurisprudence, the test to be applied by the SST-AD when determining leave to appeal is now set out in subsection 58(2) of the DESDA. Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success."

[15] Applying *Jean, Maunder and Tracey,* the Appeal Division must determine whether or not the General Division decision to summarily dismiss the Appellant's appeal demonstrates an error that would bring it within the grounds of appeal set out in section 58(1) of the DESD Act. For the reasons set out below, the Appeal Division finds that no error arises from the General Division decision to summarily dismiss the appeal.

ANALYSIS

The General Division applied the Correct Test for a Summary Dismissal.

[16] Section 53 of the DESD Act articulates the test by which the General Division must decide whether it should dismiss an appeal summarily. The General Division is enjoined to dismiss an appeal summarily if it is satisfied that the "appeal has no reasonable chance of success." Section 53 is written in mandatory terms. Once satisfied that an appeal has no reasonable chance of success, the General Division has no discretion to act otherwise than to dismiss the appeal. " The question is, of course, by what yardstick does a decision-maker decide what amounts to a reasonable chance of success? This is also the case where the Appeal Division must decide an appeal from a decision of the General Division.

[17] In Canada *(Minister of Human Resources Development) v. Hogervorst*, *2007 FCA 41*, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. More recently, Members of the Appeal Division have articulated the test for summary dismissal as "whether it is plain and obvious on the face of the record that an appeal is bound to fail." *M.C. v. Canada Employment Commission,* 2015 SSTAD 237.

[18] The Appeal Division is of the view that in situations where the facts are not in dispute; the applicable law is clear; and where on the undisputed facts the law supports one clear decision that is not in an appellant's favour this would a situation where the appeal would have no reasonable chance of success. In such a case, it would be appropriate for the General Division to dismiss the appeal summarily. This is also the view urged upon the Appeal Division by the Counsel for the Respondent.

[19] Applying the test articulated above, the Appeal Division finds that the facts of this case are not in dispute. The Appellant applied for and was awarded a retirement pension. Subsequently, her health condition deteriorated. Concluding that it would be advantageous to her to receive a disability pension rather than a retirement pension, she applied for a disability pension. The law is also clear. The applicable statutory provisions allow for the cancellation of a retirement pension in favour of a disability pension in certain defined circumstances, none of which are present in the Appellant's case.

[20] Subsection 66.1(1) of the CPP in combination with Regulation 46.2. (1) of the *Social Security Tribunal Regulations* allows a recipient of a CPP retirement pension to cancel that

pension after it has started on two conditions. First, the pensioner must make a written request to cancel the pension; and secondly, the request must be made within six months after payment of the pension has started. The Appellant made the request more than a year after she began to receive her retirement pension. As such, she is caught by the operation of paragraph 44 (1)(b) of the CPP Neither is she saved by section 66.1(1) of the CPP which subsection specifically addresses the cancellation of a retirement pension in favour of a disability pension. 66.1 (1.1) of the CPP because this would require a finding that she became disabled in or after the month for which the retirement pension first became payable. The General Division found that this was not the case. Thus, by operation of the governing statutory provisions only one outcome was possible; the appeal would necessarily be dismissed; therefore, it was appropriate for the General Division Member to dismiss the Appellant's appeal summarily as provided for by section 53 of the DESD Act.

The General Division cannot Grant Extra-Ordinary Remedies

[21] The summary dismissal of the Appellant's appeal upheld the Respondent's position. The Appellant has acknowledged the statutory bar. Nonetheless, she seeks what she concedes is an extra-ordinary remedy. She invokes "humanitarian and compassionate" considerations as the basis for the remedy she seeks. However, absent error on the part of the General Division, of which the Appeal Division finds none, there is no possible way that the Appeal Division could intervene. The issue is one of jurisdiction. The Tribunal is created by statute. As such, it can exercise only that power granted by its enabling statute; a position that was made clear by the Supreme Court of Canada in *R. v. Conway*, 2010 SCC 22. In *Conway* [3]the S.C.C. made it clear that a tribunal can grant only such remedies as it is empowered by its enabling statute to provide. Abella, J., writing for the S.C.C. , after finding that the Ontario Review Board, ("the Board"), was a court of competent jurisdiction for the purposes of granting remedies under Section 24 of the *Canadian Charter of Rights and Freedoms* denied Mr. Conway the remedies he was seeking. Abella, J. concluded,

> [101] " A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear

[3] *R. v. Conway*, 2010 SCC 22

> contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway."

[22] The Tribunal is not empowered to grant remedies based on an Appellant's financial or other need.

CONCLUSION

[23] The Appellant appealed the decision of the General Division to summarily dismiss her appeal. On the facts, evidence and law that was presented to the General Division, the Appeal Division finds that the General Division correctly determined that the appeal did not have a reasonable chance of success. The decision to dismiss the appeal summarily was appropriate. The Tribunal is bound by the jurisdiction granted to it under the DESD Act, which means that the Appeal Division lacks the capacity to grant remedies not provided for by the legislation.

[24] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division