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

Citation: *S. S. v. Minister of Employment and Social Development*, 2017 SSTGDIS 95

Tribunal File Number: GP-16-1586

Between:

S. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

INTERLOUCUTORY DECISION BY: Raymond Raphael

PRE-HEARING CONFERENCE ON: May 30, 2017

DATE OF INTERLOCUTORY DECISION: July 19, 2017

Canada

REASONS FOR INTERLOCUTORY DECISION

OVERVIEW AND HISTORY OF PROCEEDINGS

[1] The Appellant applied for a CPP disability benefit on January 20, 1994. Her application was granted on February 6, 1995 with a date of onset of disability of July 1993.

[2] On January 18, 2013 the Appellant applied for Disabled Contributor Child Benefits (DCCB) on behalf of her three children who were born in August 1997, June 1999, and October 2002. The application was approved with an effective start date of February 2012 (the maximum 11 months retroactivity allowed). The Appellant's request for reconsideration of the start date was denied.

Initial Proceedings

[3] On August 7, 2013 the Appellant appealed the reconsideration decision to the General Division of the Social Security Tribunal (Tribunal). She is requesting retroactivity back to the date of birth of her children and takes the position that because of her physically and cognitively impaired condition she was incapable of forming or expressing the intention to make the application before she did so in January 2013.

[4] On June 19, 2015 the Tribunal issued a notice of intention to summarily dismiss. The notice stated that the Tribunal Member was considering summarily dismissing the appeal because the legislation does not permit retroactive payment for the benefit claimed.

[5] On June 25, 2015 the Appellant's Member of Parliament sent a letter to the Tribunal supporting the Appellant's application. Subsequently, on July 17, 2015, the Tribunal received additional submissions from the Appellant. Although the Tribunal acknowledged receipt of the additional submissions, through an administrative error this documentation was not brought to the attention of the General Division Member prior to her summarily dismissing the appeal.

[6] On July 23, 2015 the Tribunal summarily dismissed the appeal. In the decision the Tribunal indicated that no further documents had been filed on behalf of the Appellant in response to the notice of intention. The Tribunal found that it was bound by the decision of the

Federal Court of Appeal in *Statton v. Canada (Attorney General)* 2006 FCA 370, which found that the incapacity provision does not apply to the DCCB because it only applies to applications made by a claimant for a benefit made to the claimant: not for a benefit the claimant has applied for on behalf of her children.

[7] On May 5, 2016 the Appeal Division allowed the Appellant's appeal and referred this matter back to the General Division for determination by a different member of the General Division. The Appeal Division determined that there had been a breach of natural justice because the correspondence and submissions on behalf of the Appellant in response to the notice of intention had not been considered when her appeal was summarily dismissed.

Referral Back Proceedings

[8] On June 28, 2016 the Tribunal notified the Appellant that if she wishes to pursue a constitutional challenge before the Tribunal she must file a notice in accordance with paragraph 20(1)(a) of the Tribunal Regulations by July 29, 2016.

[9] On September 9, 2016 the Appellant filed her notice of constitutional challenge.

[10] At a pre-hearing conference on October 27, 2016 the Tribunal determined that the Appellant's constitutional notice satisfied the requirements of s. 20(1)(a) of the Tribunal Regulations. The Tribunal also made directions for the conduct of the appeal including the filing of records by the parties.

[11] The directions provided, amongst other things, that the Appellant will have until January 19, 2017 to file a record comprised of supporting evidence and submissions: identifying the provisions she is challenging; identifying the rights or freedoms that were allegedly breached; setting out the relevant facts; explaining the constitutional breach; specifying the remedy she is seeking; providing evidence to support the constitutional challenge (for example, affidavit and expert evidence); and including supporting case law and other information.

[12] The Appellant filed her record on January 18, 2017.

Request to Dismiss

[13] On March 23, 2017 the Respondent filed a request under section 4 of the Tribunal Regulations for dismissal of the charter challenge portion of the Appellant's appeal.

[14] At a pre-hearing telephone conference on May 20, 2017 the Tribunal heard oral submissions with respect to the Respondent's request for dismissal.

[15] The following people attended the pre-hearing conference:

S. S.: Appellant

Sylvie Doire: Counsel for the Respondent

Nancy Wong: attending on behalf of the Minister

Chantal Marak: attending on behalf of the Minister

[16] The Tribunal has decided that the charter challenge should not be dismissed for the reasons set out below.

TEST FOR DISMISSAL

[17] The Respondent is bringing this request to dismiss pursuant to section 4 of the Tribunal Regulations which provides that a party may request the Tribunal to provide for any matter concerning a proceeding, including an extension of a time limit imposed by these Regulations, by filing a request with the Tribunal.

[18] When asked by the Tribunal why the Respondent was not requesting summary dismissal pursuant to subsection 53(1) of the Department of Employment and Social Development Act (DESDA), Ms. Doire referred to the decision of Vice-Chairperson, Dominique Bellemare in *G. v Canada Employment Insurance Commission,* GE-16-1958, February 20, 2017, unpublished, (the *G.* decision) which held that a request for summary dismissal was not available to the parties because under section 22 of the Tribunal Regulations this procedure is only initiated at the behest of the Tribunal: not one of the parties. Mr. Bellemare determined that a party could request the Tribunal to dismiss an appeal pursuant to section 4 of the Tribunal Regulations, which is the procedure that the Respondent has followed in this case.

[19] It is not necessary to make a determination of this interesting procedural question in this case because Ms. Doire acknowledged that a request to dismiss under section 4 invokes the same "no reasonable possibility of success" test applicable in summary dismissal cases.

[20] This approach is consistent with the *G.* decision in which Mr. Bellemare following the Federal Court of Appeal decision in *Lessard-Gauvin v. Attorney General of Canada*, 2013 CAF 147 applied a standard similar to summary dismissal and noted that "the standard for a preliminary dismissal of an appeal is high" and that an appeal will only be summarily dismissed "if it is obvious that its basis has no reasonable chance of success and is clearly bound to fail...."

[21] Mr. Bellemare stated that "the case law thereby informs us that these types of requests for dismissal, whether summary or regular dismissals ... must be used with caution" and that there are applicable concepts such that the appeal has "no chance of success," is "bound to fail," is "not a valid request or defense," is "utterly hopeless or weak."

[22] This Tribunal adopts this approach and agrees that whether this request is considered to be a request to dismiss under section 4 of the Tribunal Regulations or a request to summarily dismiss, the summary dismissal test and concepts apply. The Tribunal has also been guided by the decision of the Appeal Division in *L.C. v Minister of Employment and Social Development*, November 4, 2015, AD-15-995 which states that "the very act of assessing the evidence and making findings of fact – renders the appeal unsuitable for summary disposition."

RELEVANT STATUTORY PROVISIONS

[23] The following statutory and regulatory provisions are relevant to this appeal.

Canada Pension Plan Act (CPP)

[24] Subsection 60(1) of the CPP provides that no benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act.

[25] Subsection 74(1) of the CPP provides that an application for a DCCB may be made on behalf of a disabled contributor's child by the child or another person to whom the benefit, if the application were approved, be payable.

[26] Subsection 74(2) of the CPP provides that where payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with,

> (a) in the case of a disabled contributor's child's benefit, the later of
>
> > (i) the month commencing with which a disability pension is payable to the contributor under this Act or under a provincial pension plan, and
> >
> > (ii) the month next following the month in which the child was born or otherwise became a child of the contributor …

[27] Subsection 74(2)(a) of the CPP provides that the disabled contributor's child benefit shall be payable the later of the month commencing with which a disability pension is payable to the contributor and the month next following the month in which the child was born or otherwise became the child of the contributor ... *but in no case shall the benefit be payable earlier than the twelfth month preceding the month following the month in which the application was received.* (Emphasis Added).

[28] The one exception in the CPP to the maximum retroactivity rule is found under subsections 60(8) to 60(11): being incapable of forming or expressing an intention to make an application on your own behalf prior to the date the application was actually made.

[29] Subsection 60(8) of the CPP provides that if a claimant was incapable of forming or expressing an intention to apply for a CPP benefit, the application may be deemed to have been made at an earlier date.

Canadian Charter of Rights and Freedom

[30] Section 1 of the *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[31] Subsection 15(1) the *Charter* provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[32] Subsection 15(2) of the *Charter* provides that subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The Constitution Act

[33] Section 52 of the Constitution Act provides that the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, the extent of the inconsistency, of no force and effect.

ISSUE

[34] Should the charter appeal by dismissed by way of summary disposition?

Respondent's Position

[35] The Respondent has submitted that the charter challenge has no reasonable chance of success and should be dismissed because 1), it does not contain an evidentiary foundation or submissions on each part of the two part test for a breach under section 15 of the *Charter*, 2) it does not comply with the order of the Tribunal with respect to the Appellant's record, and 3) it is impossible for the Tribunal to properly assess the charter challenge and for the Respondent to know the case it has to meet.

No evidentiary basis

[36] The Respondent submitted that the Appellant did not present evidence to support a charter challenge because she provided no evidence of how subsection 74(2) of the CPP creates a) a distinction between her children and others on the basis of an enumerated or analogous ground and b) discriminates by perpetuating prejudice and stereotyping.

[37] The Respondent further argued that the Appellant did not provide evidence as to how the children are disadvantaged due to their age, how the denial of an economic benefit such as

the additional retroactive DCCB payments over and above the maximum retroactivity allowed by the CPP perpetuates a stereotype about them, or how it imposes a burden on them that is not imposed on others. The Respondent noted that other CPP benefits (including retirement, disability, and survivor benefits) have maximum retroactivity limits and that the DCCB in this case has been paid to the maximum allowed under the CPP.

Respondent not able to know the case it has to meet

[38] The Respondent submitted that the absence of information, as detailed above, deprives it of the ability to know the case to be met, to anticipate and respond to the Appellant's charter challenge, and to provide the section 1 (the *Oakes* test) justification. As a matter of natural justice the Respondent is entitled to sufficient information to know the case against it and the opportunity to present its own case. The Respondent cannot provide a responsive record as it is not clear what the evidentiary basis is or what the Appellant's arguments are with respect to the section 15(1) test. Further, the Tribunal is deprived of the necessary factual foundation to properly adjudicate the appeal.

No reasonable chance of success

[39] The Appellant has not provided a charter record that is in full compliance with the Tribunal direction letter dated October 17, 2016, or the factual foundation necessary to be considered a charter appeal. Nor is there a distinction on the basis of an enumerated or analogous ground under section 15(1) of the Charter or arguments as to how the legislation is discriminatory in relation to the two part test. Therefore, a balanced and thorough assessment by the Tribunal is impossible. The deficiencies in the Appellant's record demonstrate that the charter challenge has no reasonable chance of success.

[40] Further, to allow this appeal to continue to proceed as a charter appeal would further delay the resolution of this matter, result in a misuse of resources on the part of the parties and the Tribunal, and would be contrary to paragraphs 2 and 3(1)(a) of the Tribunal Regulations which require, respectively, that the Tribunal interpret the Regulations so as to secure the just, most expeditious and least expensive determination of appeals and to conduct hearings as informally and quickly as the circumstances of fairness and natural justice permit.

Appellant's Position

[41] The Appellant's position is set out in her response to the notice of intention to summarily dismiss [GD9]; her constitutional notice [GDR4]; and her submissions [GDR8] filed in response to the Tribunal's direction letter.

Response to Notice of Intent to Dismiss

[42] In her response to the notice of intention to summarily dismiss she stated: the 11-month retroactive period restriction should not apply to children until they are 18 years old and are able to make the application on their own behalf. This restriction breaches their equality rights under the *Charter* because it fails to take into account that they are the minor children of a disabled parent.

Constitutional Notice

[43] In her constitutional notice the Appellant set out the constitutional question as follows:

> Does section 74(2) of the *Canada Pension Plan*, by limiting the retroactive benefit payable to 11 months, impose an adverse effect on children on the basis of age, perpetuating the disadvantaged and vulnerable position of children in Canadian society, and therefore violate section 15 of the *Charter?*

[44] She stated that the provision imposes an adverse effect on children of beneficiaries as a consequence of their age and that the legislation fails to properly take into account their needs, circumstances, and capacities: the legislation presumes that children have the same capacity to exercise their entitlements under the CPP as an adult – this disadvantages children who are inherently disadvantaged and highly vulnerable. They are being denied the full retroactivity of a benefit that they would be otherwise eligible for if they had been able to apply for it on their own.

[45] She further stated that this offends the dignity and freedom of children by marginalizing them and treating them as less worthy without regard to their actual circumstances; that the children are denied equality before and under the law and the equal protection and benefit of the law because of age; that the government has drawn a distinction and is perpetuating a prejudice against children who are dependent on a parent to act on their behalf; and that the limitation on

retroactive benefits, by failing to account for the capabilities and circumstances of children, communicates that children are less entitled to exercise rights they hold equally with adults because of their dependent status.

Appellant's Submissions

[46] The Appellant explained the constitutional breach and stated that the CPP provision that limits retroactivity of the DCCB to 11 months "offends the dignity and freedom of children by marginalizing them and treating them as less worthy without regard to their actual circumstances... the government has drawn a distinction and is perpetuating a prejudice against children who are dependent on a parent to act on their behalf ... the limitation on retroactive benefits, by failing to account for the capabilities and circumstances of children, communicates that children are less entitled to exercise rights they hold equally with adults because of their dependent status."

[47] She further stated that they are "dependents and as children of a disabled parent particularly disadvantaged"; and [that] while "Parliament is entitled to develop a legislative scheme to administer these benefits and needs to draw a line, it is not permitted to do so in a manner that perpetuates the disadvantage of children who don't have the ability to access the benefits beside depending on an adult."

[48] She also summarized the evidence to support the constitutional challenge and stated:

> Reducing benefits by restricting retroactivity exacerbates the income vulnerability of the children and their families, which is against the very purpose of the CPP disability benefits. The purpose of the legislature is to benefit the children and assist this vulnerable group with a clear pre-existing disadvantage due to their age and being a dependent child of a person with a disability. The fact that they are minors and have a disabled parent must both be considered and are both relevant contextual factors. Limiting retroactivity in this way in an attempt to draw a line in administering their benefit puts an unfair and unreasonable limit on the rights of these children...
>
> The impugned law perpetuates prejudice and disadvantage to minor children based on their age and dependence on an adult and limiting the retroactivity of their benefits because of their dependence exacerbates the situation of the group...
>
> Substantive inequality recognizes that policies and practices put in place to suit everyone may appear to be non-discriminatory, but may not address the specific

> needs of certain groups of people. In effect they are indirectly discriminatory. This is the case in this situation.

[49] She also set out the remedy that she is seeking, namely, that subsection 74(2) of the CPP in so far as it limits the retroactivity of the DCCB to 11 months, violates section 15 of the Charter; that it should have no force and effect; and that her children should receive the DCCB retroactively to the date of their birth.

Analysis

[50] In determining this matter it is necessary to keep in mind that this is a request for summary disposition of the charter challenge without a full oral hearing on the merits. The standard for such a dismissal will only be met when the charter challenge "has no reasonable chance of success" and is "bound to fail." Further, the Tribunal should not assess the evidence and make findings of fact.

[51] In determining a request such as this the Tribunal must attempt to strike a balance between three (often competing) interests, namely, 1) subsection 3(1) of the Tribunal Regulations which indicates that the Tribunal must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit, 2) access to justice in which the Tribunal is often (as it is in this case) dealing with an unrepresented Appellant who cannot afford legal representation and to hire experts, and 3) the legal requirement that there be an evidentiary foundation for the charter claim.

[52] This can often be a difficult balance. On one hand the Tribunal does not wish to make it practically impossible for an unrepresented person to pursue a charter challenge. On the other hand there has to be at least a coherent evidentiary and legal foundation for the claim.

[53] The Tribunal is satisfied that the Appellant has met the requirements to allow this charter to proceed to a full oral hearing on the merits. It cannot be said that the charter appeal is "bound to fail." Although it may be argued that the Appellant's submissions lack weight and that they could be better developed, at this stage the Tribunal should not assess the evidence and make findings of fact.

[54] The Appellant has set out an arguable case based on her children being the minor children of a disabled parent: the limitation of their DCCB retroactivity to 11 months potentially fits within the discrimination requirements of subsection 15(1) of the Charter. She has substantially met the requirements for a record pursuant to the Tribunal's direction and the Respondent has reasonable knowledge of the nature of the charter challenge that it has to respond to.

[55] This matter should to proceed to a full oral hearing on the merits.

CONCLUSION

[56] The request for dismissal of the charter challenge is dismissed.

[57] The Respondent shall deliver its record by September 15, 2017 and the Appellant shall have until October 16, 2017 to deliver a reply record, if so advised.

Raymond Raphael
Member, General Division - Income Security