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

Citation: *A. N. v. Minister of Employment and Social Development*, 2017 SSTADIS 405

Tribunal File Number: AD-15-1118

BETWEEN:

A. N.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: November 30, 2016

DATE OF DECISION: August 11, 2017

Canada

REASONS AND DECISION

IN ATTENDANCE (via videoconference)

Appellant's representative:	James Macdonnell (counsel)
Respondent's representative:	Penny Brady (counsel)
	Stéphanie Pilon (paralegal) and Anna Boudria (paralegal)

OVERVIEW

[1] At its core, this case is about whether the Appeal Division has any jurisdiction to adjust the Appellant's Canada Pension Plan (CPP) contributions, after his income has been adjusted. The Appellant seeks an adjustment to his CPP contributions for 1999 and 2001, under subsection 97(2) of the CPP. The subsection allows for the rectification of a Record of Earnings in certain cases.

BACKGROUND & HISTORY OF PROCEEDINGS

[2] The relevant facts for the purposes of this appeal are as follows:

- The Appellant filed his 1999 and 2001 income tax returns with the Canada Revenue Agency (CRA) in 2004. The CRA issued assessments in March 2004. The Appellant had nil income and nil contributions to the CPP for both years.

- In January 2005, the Appellant filed an application for a CPP disability pension (pages GT1-69 to 72 of the hearing file). The Respondent denied his application for a disability pension on the basis that he had insufficient contributions to the CPP. Between 1998 and 2003, the Appellant had valid contributions in 1998 and 2000. He required an additional two years of valid contributions to meet the contributory requirements for a CPP disability pension.

- The Appellant alleges that he discovered that his accountant had made errors in his 1999 and 2001 income tax returns. Accordingly, he refiled his 1999 and 2001 income tax returns in 2010, under the Voluntary Disclosure Program.

- On June 14, 2010, the CRA reassessed the Appellant's 1999 income taxes (GT1-27). The CRA adjusted his self-employment income to $4,084, along with his CPP contributions for 1999, to $40.88. The Record of Earnings was adjusted to reflect these earnings and contributions for 1999.

- On November 8, 2010, the CRA reassessed the Appellant's 2001 income taxes (GT1-19), contrary to the findings of the General Division. The CRA adjusted the self-employment income to $4,356, but did not adjust the CPP payable contributions for 2001. The CRA wrote, "We did not adjust the CPP payable on self-employed income as you have past [*sic*] the 4 years [*sic*] time limit."

- Had the CRA adjusted the Appellant's CPP payable for 2001 and had Employment and Social Development Canada adjusted the Record of Earnings accordingly, together with the adjustments to his CPP payable contributions for 1999, the Appellant would have sufficient valid contributions to the CPP and a minimum qualifying period that ended on December 31, 2003. Otherwise, without adjustments to the Record of Earnings to reflect CPP contributions for both 1999 and 2001, the Appellant continued to have insufficient contributions to the CPP.

- There was a string of subsequent correspondence between the Appellant and the Respondent. Correspondence from the Respondent stated that, as the Appellant had not filed his income tax return for 2001 within the four-year time limit set out in subsection 30(5) of the CPP, his CPP contributions for 2001 had been deemed to be zero and he was not entitled to any discretionary relief under subsection 97(2) of the CPP (e.g. pages GT1-10/92; 15/95/115; 43 to 44/132 to 13; 48 to 50/111 to 113 and 92).

[3] The General Division summarily dismissed the Appellant's appeal, on the basis that it had no authority to grant any discretionary relief under subsection 97(1) of the CPP. The General Division determined that, in any event, as the Appellant had not sought to change the entry in his Record of Earnings for 2001 until 2010, it was too late for him to have the Record of Earnings changed; it was "long after the expiry of the four year time

period permitted to do so." The Appellant appealed this decision, alleging that the General Division improperly refused to exercise its jurisdiction and change the 2001 CPP contributions. He notes that the CRA had already accepted a cheque for $36.83, the amount owed for the 2001 CPP contributions. The Appellant argues that if the CRA was unprepared to change his CPP contributions for 2001, as a matter of consistency, the Respondent ought not to have amended his 1999 and 2001 Record of Earnings or changed his 1999 CPP contributions. He argues that the CRA should be made to return $1,059.28 in taxes that he paid after his 1999 Record of Earnings had been adjusted.

[4] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESDA), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Given the complexities of the legal issues involved, the detailed facts of this matter, and by request of the Respondent, this appeal before me proceeded by videoconference,[1] pursuant to paragraph 21(*b*) of the *Social Security Tribunal Regulations.*

ISSUES

[5] At the outset, the Appellant advised that he would not be proceeding with any arguments or submissions under the *Canadian Charter of Rights and Freedoms* (Charter). Following a post-hearing conference on June 2, 2017, the Appellant sought to introduce written submissions that his rights under section 15 of the Charter had been infringed.

[6] The post-hearing conference was intended to enable the Appellant to explore and pursue any relief that might be available to him through a superior court of the province. It is unclear whether the Appellant intends to pursue that avenue.

[7] Apart from the fact that the Appellant has failed to comply with the filing requirements under section 20 of the *Social Security Tribunal Regulations*, his Charter submissions come too late in the proceedings, such that it would prejudice the Respondent if

[1] I would have been prepared to grant the Respondent's initial request for an in-person hearing, but the Respondent subsequently withdrew its request.

I were to consider them, or it would cause undue delay in these proceedings. Generally, I am unprepared to exercise any discretion and consider Charter arguments for the first time on appeal, if these arguments had not been raised before or considered by the General Division, and particularly when there is no evidentiary record or any findings of fact dealing with the issues raised by the Appellant.

[8] The following issues are therefore before me:

a. Is new evidence admissible on an appeal to the Appeal Division?

b. Does either the General Division or Appeal Division have any jurisdiction or authority under subsection 97(1) of the CPP to adjust the 2001 CPP contributions or to compel the Respondent to make the adjustment?

c. Did the General Division appropriately summarily dismiss the appeal? If not, what is the appropriate disposition of this appeal?

GROUNDS OF APPEAL

[9] Subsection 58(1) of the DESDA sets out the grounds of appeal. It reads: 58

(1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE 1: PRELIMINARY ISSUE—NEW EVIDENCE

[10] In the course of the proceedings before the Appeal Division, the Appellant filed new correspondence that had not been before the General Division. More importantly, the correspondence did not address any grounds of appeal.

[11] The Respondent argues that this correspondence should not be admitted, relying on the *Social Security Tribunal Regulations*, sections 23 and 24, and *N.G. v. Minister of Employment and Social Development*, 2014 SSTAD 347, at paragraph 17.

[12] It has now become well-settled law that new evidence does not constitute a ground of appeal. As the Federal Court held in *Parchment v. Canada (Attorney General)*, 2017 FC 354, at paragraph 23, the Appeal Division "[does] not consider new evidence."

[13] In any event, I do not find the correspondence to be germane or of any probative value, given that it represents the Appellant's pleas to political representatives, including the former Minister of Employment and Social Development, for an adjustment to his 2001 CPP contributions. The correspondence does not materially add to the existing materials.

ISSUE 2: SCOPE OF SUBSECTION 97(2) OF THE *CANADA PENSION PLAN*

[14] Part III of the CPP delineates the duties and responsibilities between the Respondent (the Minister of Employment and Social Development) and the Minister of National Revenue. Under section 91 of Part III of the CPP, "Minister" means the Minister of Employment and Social Development, whereas under section 5 of Part I of the CPP, "Minister" is defined as the Minister of National Revenue. Under subsection 92(1), the Respondent has the control and direction of the administration of the CPP, other than Part I of the Act, which deals with contributions to the CPP. Part I includes Division A – contributions payable; Division B – calculation of contributions; and Division D – collection of contributions in respect of self-employed earnings, under sections 30 to 37 inclusive.

[15] Subsection 92(2) of the CPP confirms that the Minister of National Revenue has the control and direction of the administration of Part I of the CPP and that, from time to time, the Minister of National Revenue is to report to the Respondent information with respect to the earnings and contributions of any contributor to permit the calculation of the amount of the unadjusted pensionable earnings. Section 95 of the CPP requires the Respondent to establish records, "to be known as the Record of Earnings," of information obtained under the CPP with respect to the earnings and contributions of contributors.

[16] Subsections 97(1) and (2) of the CPP reads as follows:

> Entry in record of earnings presumed to be accurate
>
> 97 (1) Notwithstanding section 96, except as provided in this section, any entry in the Record of Earnings relating to the earnings or a contribution of a contributor shall be conclusively presumed to be accurate and **may not be called into question after four years have elapsed from the end of the year in which the entry was made**.
>
> Rectification of Record in certain cases
>
> (2) If
>
> (a) from information furnished by or obtained from the records of an employer or a former employer, or an employee or a former employee of an employer, or a person required to make a contribution in respect of his self-employed earnings, after the time specified in subsection (1), or
>
> (b) for any other reason,
>
> it appears to the Minister that the amount of the unadjusted pensionable earnings shown in the Record of Earnings to the account of an employee or former employee of that employer or to the account of that person is less than the amount that should be so shown in that Record, **the Minister may cause the Record of Earnings to be rectified** in order to show the amount of the unadjusted pensionable earnings of the contributor that should be so shown therein.
>
> (My emphasis)

[17] Subsection 97(1) of the CPP provides that any entry in the Record of Earnings relating to the earnings or contributions of a contributor shall be conclusively presumed to be accurate and may not be called into question after four years have elapsed from the end of the year in which the entry was made.

[18] The Appellant disputes the applicability of the subsection to him because he filed his 2001 income tax return within four years, when he initially filed it in 2004, and argues that, accordingly, the 2001 CPP contributions should be adjusted on the basis of his 2010 re-

filing. He also maintains that it would be inconsistent to adjust his 1999 CPP contributions, on the one hand, and not adjust his 2001 CPP contributions, on the other hand.

[19] According to the CRA's letter dated May 14, 2012, the 2001 return with self-employed earnings was required to be filed on or before June 15, 2002, and the four-year deadline was therefore June 15, 2006, after which it considered the 2001 return "statute-barred" (see AD1-19) (notwithstanding the fact that the Appellant refiled the 2001 return in 2010).

[20] In other words, the Respondent is of the position that the Record of Earnings ought to have been called into question by June 15, 2006, otherwise the entry in the Record of Earnings would be presumed to be accurate. The Appellant did not refile his 1999 and 2001 income tax returns until 2010, almost four years after he might have been able to seek any changes to the entries in his Record of Earnings. As the reassessment was not made within the required time limit of four years from the end of the year in which the entry was made, the Record of Earnings was deemed conclusive. By June 2006, the Appellant had not made any CPP contributions for 2001. Therefore, it was deemed conclusive that the Appellant had zero CPP contributions for 2001.

[21] The four-year time limit does not bar rectifying the earnings (as distinct from contributions) because the subsection specifically provides for rectification under paragraph 97(2)(*b*) "to show the amount of the unadjusted pensionable earnings." In other words, the subsection indicates that the Respondent is limited to rectifying the Record of Earnings to the extent of showing only the "amount of the unadjusted pensionable earnings." The subsection does not explicitly speak to rectifying CPP contributions *per se*. At most, it suggests that the Respondent does not have any express authority under subsection 97(2) of the CPP to make any adjustments to CPP contributions.

[22] The Respondent acknowledged that while the 1999 reassessment of the Record of Earnings to include business income was correct, the 1999 CPP contributions ought not to have been adjusted. The Respondent argued, however, that the error made in respect of the

1999 CPP contributions did not thereby allow that error to be replicated by adjusting the Appellant's 2001 CPP contributions.

[23] Further, the Respondent argues that, in this case, the CPP contributions for 2001 were deemed by the Minister of National Revenue to be zero, under subsection 30(5) of the CPP, and, where the CRA has deemed that no CPP contribution is payable for a given year, the Minister of Employment and Social Development has no authority under subsection 97(2) of the CPP to deem a contribution payable.

[24] Section 30 of the CPP falls within Part I, and is under the control and direction of the Minister of National Revenue. Subsection 30(5) reads:

> **Where no return filed within four years**
>
> **(5)** The amount of any contribution required by this Act to be made by a person for a year in respect of their self-employed earnings for the year is deemed to be zero where
>
> **(a)** the return of those earnings required by this section to be filed with the Minister [of National Revenue] is not filed with the Minister [of National Revenue] before the day that is four years after the day on or before which the return is required by subsection (1) to be filed; and
>
> **(b)** the Minister [of National Revenue] does not assess the contribution before the end of those four years.
>
> R.S., 1985, c. C-8, s. 30; 1991, c. 49, s. 209; 1997, c. 40, s. 66.

[25] The Appellant relies on a statement made by the General Division at paragraph 13 of its decision that his contributions should not be deemed zero on the basis of subsection 30(5) of the CPP, given that he had filed his 1999 and 2001 income tax returns in 2004. However, subsection 30(5) of the CPP presupposes that a return has not been filed within four years. In the case where a taxpayer has filed a return within four years, the deeming provisions have no applicability. Here, it seems that the Respondent did not need to rely on the deeming provisions, as the Appellant had initially filed returns for 1999 and 2001 that indicated "nil" income and therefore zero CPP contributions. Had the Appellant failed to file returns within four years, the Respondent could have relied on the deeming provisions. If the

Appellant relies on the returns filed in 2010, those returns were filed beyond the four-year timeframe and, under paragraph 97(2)(*b*) of the CPP, the Respondent was under no obligation to rectify the Record of Earnings, given the paragraph's permissive language.

[26] Notwithstanding paragraph 97(2)(*b*) of the CPP, I note that, under subsection 52(3) of the CPP, a contributor shall be deemed to have made a contribution for any year for which his unadjusted pensionable earnings exceed his basic exemption for the year (and shall be deemed to have made no contributions for any year for which his unadjusted pensionable earnings do not exceed his basic exemption for the year). Hence, if subsection 30(5) of the CPP does not apply, and if the unadjusted pensionable earnings are found to be above the year's basic exemption (such as appears to have been the case here), then under subsection 52(3) of the CPP, any adjustment to the unadjusted pensionable earnings above the year's basic exemption should permit contributions to be deemed to have been made.

[27] In *Walters v. Canada (Minister of Employment & Immigration)*, [1996] FCJ No. 176, the Federal Court of Appeal addressed the issue of whether the applicant had made sufficient valid contributions to the CPP. It wrote:

> 5 Nor is it possible to consider the year 1988 as having been one during which the applicant made valid contribution, even though her contribution in that year was only $6.12, well below her basic exemption amount, on the basis that the contribution was registered in the applicant's Record for that year, and, four years having elapsed, it is deemed to be accurate pursuant to section 97. This section 97, one of the sections dealing with the administration of the Plan, makes it indisputable that the amount shown in the Record prepared in accordance with the Plan is accurate, but it is paragraph 52(3) of the Plan, a basic eligibility provision, that determines whether such payment was sufficient to be a valid yearly contribution.

[28] The Federal Court of Appeal determined that subsection 52(3) of the CPP determines whether payments are sufficient to be valid yearly contributions. However, the subsection has to be read against the backdrop of subsections 97(1) and (2) of the CPP.

[29] Although the Appellant argues that subsection 97(2) of the CPP has no applicability, at the same time, he submits that the General Division erred by not exercising its jurisdiction and by not adjusting his contributions for 2001. He claims that the General Division (and, for that matter, the Appeal Division) has a broad discretion under subsection 97(2) of the CPP to grant the relief he seeks, given what he perceives as inequities. In particular, he claims that it is unfair that the CRA can render two inconsistent decisions on the adjustment of his CPP contributions for 1999 and 2001, within the same calendar year, a mere few months apart. More importantly, he asserts that it is unfair that the 1999 and 2001 Record of Earnings were adjusted to attribute income, which resulted in income tax payable, but that the pensionable credits or contributions to the CPP for 2001 were not adjusted when his 2001 income was adjusted. He claims that it is unfair because he did not receive any corresponding benefit for either 1999 or 2001 and was effectively deprived of the opportunity to qualify for a disability pension.

[30] A plain reading of subsection 97(2) leads me to conclude that it does not empower either the General Division or the Appeal Division to rectify the Record of Earnings, as it is only the Respondent who may "cause the Record of Earnings to be rectified". The Appellant has been unable to provide me with any authorities to suggest otherwise. I have no jurisdiction over subsection 30(5) of the CPP, and no authority under section 97 to adjust contributions to the CPP. If the Appellant chooses to challenge the applicability of the subsections over the amount of any alleged contributions to the CPP, his recourse as a self-employed person may lie elsewhere, such as with a superior court with jurisdiction respecting the CPP.

[31] Section 27 of the CPP allows the Minister of Employment and Social Development and any other person concerned with a ruling made under section 26, including whether a contribution is payable and what the amount of the contribution that is payable, to appeal that ruling to the Minister of National Revenue. However, section 28 does not provide contributors who are not employers or employees with a right of appeal to the Tax Court of Canada, with respect to such rulings. The CPP does not grant the Tax Court of Canada jurisdiction over such rulings, and the Tax Court of Canada has no inherent jurisdiction to

hear them. As the Tax Court of Canada determined in *Bauman v. The Queen*, 1998 CanLII 476 (TCC), the appellants in that case were required to have their rights determined by bringing an action in a superior court with jurisdiction respecting the CPP.

ISSUE 3: SUMMARY DISMISSAL

[32] A summary dismissal is appropriate when there are no triable issues, when there is no merit to the claim or, as subsection 53(1) of the DESDA reads, when there is "no reasonable chance of success." However, if there is a sufficient factual foundation to support an appeal and the outcome is not "manifestly clear," then the matter is not appropriate for a summary dismissal. A weak case is not appropriately summarily dismissed, as it involves assessing the merits of the case and examining the evidence and assigning weight to it.

[33] The facts were not in dispute. The parties accepted that the Appellant had filed his 1999 and 2001 income tax returns in 2004 and that he refiled in 2010. The parties also accepted that the Appellant requested a readjustment of the Record of Earnings to include contributions to the CPP for 1999 and 2001. Ultimately, the General Division determined that it did not have the jurisdiction under subsection 97(2) of the CPP to grant the relief the Appellant seeks.

[34] As the General Division does not ultimately have any jurisdiction to provide the relief the Appellant seeks, namely, that the Record of Earnings be rectified to allow for CPP contributions for 2001, the General Division properly summarily dismissed the appeal before it.

CONCLUSION

[35] Given the facts, there was no reasonable chance of success and the General Division appropriately summarily dismissed the matter. Accordingly, the appeal is dismissed.

Janet Lew
Member, Appeal Division