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

Citation: *S. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 580

Tribunal File Number: AD-16-880

BETWEEN:

S. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: October 31, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant has been granted leave to appeal a decision of the General Division of the Social Security Tribunal (Tribunal), dated March 15, 2016. That decision determined that an application to rescind or amend an earlier decision (February 25, 2014) was statute-barred by virtue of it being filed beyond the one-year limitation period.

[2] There is no dispute that the application to rescind or amend was in fact filed on May 29, 2015, more than one year after the decision had been communicated to the Appellant. Rather, the Appellant submits that the General Division denied him natural justice by not advising that the limitation period was in issue, such that an opportunity to provide submissions was precluded, and that the General Division erred in law by applying a strict rather than liberal interpretation of s. 66(2) of the *Department of Employment and Social Development Act* (DESDA).

[3] This appeal is proceeding on the record. No further hearing is required, since there is to be no testimony, both parties are represented and both representatives have provided detailed written submissions. This method of proceeding is consistent with the Tribunal's obligation to proceed informally and expeditiously, while respecting the requirements of fairness and natural justice, set out in s. 3(1) of the *Social Security Tribunal Regulations*.

[4] I have considered the documentation before the General Division, the General Division decision, the Appellant's submissions (June 23, 2016 and June 12, 2017) and the Respondent's submissions (June 7, 2017 and June 30, 2017).

ISSUES

[5] Did the General Division fail to observe a principle of natural justice by neglecting to advise the Appellant that the limitation period was in issue?

[6] Did the General Division err in law in its interpretation and application of s. 66(2) of the DESDA?

[7] If a reviewable error was made, what is the appropriate remedy?

THE LAW

[8] As set out in s. 58(1) of the DESDA, the grounds of appeal to the Appeal Division include that the General Division failed to observe a principle of natural justice (s. 58(1)(*a*)) and that the General Division erred in law in making its decision (s. 58(1)(*b*)).

[9] The powers of the Appeal Division, pursuant to s. 59(1) of the DESDA, include dismissing the appeal, giving the decision that the General Division should have given, referring the matter back to the General Division for reconsideration, or confirming, rescinding or varying the General Division decision.

[10] This appeal raises questions about the interpretation of s. 66 of the DESDA, which reads as follows:

> 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 relation to the *Employment Insurance Act* […]
> (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.
>
> (3) Each person who is the subject of a decision may make only one application to rescind or amend that decision.
>
> (4) A decision is rescinded or amended by the same Division that made it.

STANDARD OF REVIEW

[11] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies. Rather, such appellate bodies are to apply the grounds of appeal established within their home statutes. In this respect, I agree with the Appellant's and Respondent's submissions that, based on the unqualified wording of s. 58(1)(*a*) and (*b*) of the DESDA, no deference is owed to the General Division on questions of natural justice, jurisdiction or errors of law.

FAILURE TO OBSERVE A PRINCIPLE OF NATURAL JUSTICE

[12] As outlined in the General Division decision, the member had adjourned an oral hearing and had instead requested written submissions from the parties. Although she asked for submissions "with respect to section 66," the member specifically quoted s. 66(1)(*b*) of the DESDA, with no reference to the time limit provision found in s. 66(2). In response, Appellant's counsel filed submissions on the question of whether new material facts had been presented that could not have been discovered at the time of the hearing, with the exercise of reasonable diligence (the test found in s. 66(1)(*b*)). As the General Division noted in its decision, Appellant's counsel did not address the limitation period found in s. 66(2), and the Respondent did not file submissions. No further hearing was held prior to a decision being issued.

[13] The Respondent now concedes, and I agree, that the General Division failed to observe a principle of natural justice in this respect. Specifically, the General Division's direction to the parties on the subject of the written submissions misled the Appellant, such that he did not know the case to be me and consequently did not fully present his arguments.

[14] The Appellant has also claimed an error of law with respect to the application of the time limit, and his representative has now provided fulsome submissions on this issue. Consequently, I see no reason to return this matter to the General Division solely on the basis of the failure to observe a principal of natural justice. Rather, I will proceed to consider whether the General Division erred in its substantive determination, in consideration of the parties' extensive submissions on the interpretation and application of s. 66(2) of the DESDA.

INTERPRETATION OF S. 66(2)

[15] The Supreme Court of Canada discussed the principles of statutory interpretation in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 (referenced by the Appellant's representative):

> [21] […] Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> […]
>
> [27] […] It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

[16] Pursuant to s. 12 of the *Interpretation Act*, "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[17] As the Supreme Court of Canada stated in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, the *Canada Pension Plan* (CPP) is "designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent."

[18] Prior to April 1, 2013, the authority of the predecessor tribunals was found in the CPP; in particular, s. 84(2) permitted the Minister, a Review Tribunal or the Pension Appeals Board to rescind or amend a decision on new facts, with no time limit expressly stated.

[19] As the Appellant's representative has noted, the House of Commons Debates (May 11, 2012) outlined an intention to combine a number of appeal bodies into one Tribunal, as a "simple, more efficient, single window For Canadians to access appeals and the appeals process […]" Similarly, the Federal Court of Appeal in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, wrote that the creation of the Social Security Tribunal was "intended to provide more efficient, simplified and streamlined appeal processes […]" through a single point of contact.

[20] Part 5 of the DESDA (in which s. 66 is located) establishes the Tribunal and its procedures for appeals of decisions made under the CPP and other legislation. There are three time limit provisions in Part 5 of the DESDA. Appeals to the General Division must be brought within 30 or 90 days of communication of the decision under appeal, subject to an extension (to a maximum of one year) which may be granted by the General Division (s. 52). Similarly, applications for leave to appeal to the Appeal Division must be made within 30 or 90 days of communication of the General Division decision, again subject to an extension (to a maximum of one year) which may be granted by the Appeal Division (s. 57). In contrast, s. 66 does not include a subsection permitting the relevant Division to allow further time to file.

[21] I note that, on the facts of this appeal, the interpretation of s. 66(2) is not complicated by, and need not take into account, the transitional provisions dealing with the treatment of appeals from the predecessor tribunals.

[22] The Federal Court has recently had the opportunity to address the interpretation of s. 66(2), in *Fazal v. Canada (Attorney General)*, 2016 FC 487:

> [3] It is clear that the application for leave was filed more than one year after the date that the decision was communicated to the appellant. The *Act* does not permit any discretion to be applied. On the standard of correctness the decision was correct.

[23] Similarly, in *Tang v. Canada (Attorney General)*, 2017 FCA 59, the Federal Court of Appeal stated the following:

> [8] The Appeal Division rejected the application for rescission or amendment, in part, because Mr. Tang did not submit the application within the one year required time period provided for in subsection 66(2) of the Act. The Appeal Division found that Mr. Tang submitted his application more than two months late. This conclusion was reasonable and it did not give rise to a reviewable error.

[24] The language used in s. 66(2) is unequivocal: "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." Reading these words in their entire context, in their grammatical and ordinary sense, in harmony with the object and scheme of the DESDA (which establishes an appellate body's procedural rules and elsewhere provides for time limit extensions), and in harmony with the intention of Parliament (to establish a simple and efficient appeals process) leads me to only one possible interpretation: the application to rescind or amend must be made within one year after the day on which the Tribunal decision was communicated, with no exceptions or extensions permitted. The provision says what it means, and it means what it says.

[25] I cannot agree with the Appellant's submission that it is "inconceivable that Parliament could have intended the consequences of a strict interpretation," nor do I find this interpretation to lead to absurd consequences. In my view it is abundantly clear, from its choice of language and structure, particularly when contrasted with other provisions in the same Part and the predecessor provision in the CPP, that this is exactly what Parliament intended. If Parliament had intended to provide discretion to grant an extension of time, it could easily have done so. Furthermore, by the time a rescind or amend application arises, a claimant has already had the opportunity to file an initial claim, a reconsideration claim, an appeal to the General Division and, in some cases, an appeal to the Appeal Division; in this context, it does not strike me as extremely unreasonable, inequitable, illogical or incoherent for Parliament to establish finality if an application to rescind or amend has not been made within a year of the decision..

THE APPLICATION OF EQUITABLE PRINCIPLES AND THE COMMON LAW DOCTRINE OF SPECIAL CIRCUMSTANCES

[26] The Appellant's representative further submits that equitable principles may be applied to justify proceeding with an application beyond the statutory time limit, and/or that the doctrine of special circumstances ought to be applied.

[27] He states that it is settled law that a tribunal can "apply equitable principles in the exercise of its statutory mandate," relying upon an arbitration decision of the Financial Services Commission of Ontario (*Hill v. Wawanesa Mutual Insurance Co.*, 2003 CarswellOnt 3748). This decision is not binding upon me, but in any case it does not support a broad quasi-judicial power to invoke equitable relief. Rather, the arbitrator in *Hill* considered equitable principles to deal with an abuse of process when she interpreted s. 23(1) of the *Statutory Powers Procedure Act* (which allowed her tribunal to "make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its process") as authorizing an award of punitive costs against a non-party. The arbitrator's order was made within the bounds of her statutory authority.

[28] In a recent appeal, the Alberta Court of Appeal recognized that the common law "can and does apply to statutory tribunals," but held that a Board decision to grant benefits unauthorized by the legislation, on the basis of fairness or equity, was in direct conflict with the statute and hence unreasonable (*Alberta v. McGeady*, 2015 ABCA 54, leave to appeal to the Supreme Court of Canada refused).

[29] Similarly, as the Respondent has highlighted, the Supreme Court of Canada has held that "[i]t is not open to a court to apply a common law rule in the face of clear statutory direction" (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch*), [2001] 2 SCR 781; see also *Prebushewski v. Dodge City Auto (1984) Ltd.*, [2005] 1 SCR 649).

[30] The Appellant also relies upon the following comment from the Nova Scotia Court of Appeal (*Butler v. Southam Inc.*, 2001 NSCA 121):

> [139] In considering what is equitable, a fundamental consideration is whether the harsh result to the plaintiff of the loss of a cause of action is disproportionate to the purposes served by giving effect to the limitation provision in issue in the particular case. […]

[31] In that case, however, the Court of Appeal had already determined that there was statutory authority not to apply the limitation period: "[…] the chambers judge was right to conclude that he had jurisdiction under s. 3 of the *Limitation of Actions Act* to relieve against both the notice and limitations requirements […]" Consequently, equitable considerations were made only within the exercise of discretion permitted by statute.

[32] The Appellant further submits that the Ontario Superior Court of Justice decision of *Cappello v. Quantum Limousine Service Inc.*, 2012 ONSC 2507 stands for the principle that "[w]here there is no prejudice from the expiry of a limitation period, equitable principles have been used to justify proceeding notwithstanding the expiration." In fact, *Capello* permitted only an amendment of a statement of claim, after the limitation period had expired, in circumstances where "the proposed amendment would amount to no more than correction of the misnaming of the parties."

[33] As for the special circumstances doctrine advanced by the Appellant, its history is outlined in *S. M. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 214:

> [42] The doctrine of special circumstances has its origin in the English case of *Weldon v. Neal* (1887), 19 Q.B.D. 394 (C.A.), Lord Esher M.R. The leading Canadian case of *Basarsky v. Quinlan* 1971 CanLII 5 (SCC), [1972] S.C.R. 380, adopted the doctrine of special circumstances and allowed the addition of plaintiffs after the expiry of the limitation period. The Ontario Court of Appeal in *Meady v. Greyhound Canada Transportation Corp.* (2008), 2008 ONCA 468 (CanLII), 90 O.R. (3d) 774 described this doctrine as "the common law doctrine of special circumstances." **Although the doctrine does not provide general authority to extend a limitation period (*Greyhound, supra*), it has been applied to amend pleadings to add parties or new causes of action after expiry of a limitation period where the claim ought to have been added to the original pleading.** Examples are *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 2001 CanLII 8620 (ON CA), 56 O.R. (3d) 768 (CA), *Thoman v. Fleury* (1996), 1996 CanLII 992 (ON CA), 28 O.R. (3d) 398 (CA), and *Swain Estate v. Lake of the Woods District Hospital* (1992), 1992 CanLII 7601 (ON CA), 9 O.R. (3d) 74 (CA). [emphasis added]

[34] Consistent with this summary, in *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, the Ontario Court of Appeal held that this doctrine could be applied to amend pleadings or add parties but not to extend limitations periods; this "would be contrary to the purpose of the new Act by removing the certainty of its limitation scheme."

[35] I recognize that the Appeal Division applied the doctrine of special circumstances to extend the limitation period in *S. M.* The facts in *S. M.* were unusual, in that two applications had been successfully filed under the predecessor provisions (which did not impose a time limit), and then transferred to the Tribunal where they were caught by the limitation period. In these specific circumstances, the Appeal Division was persuaded by the analysis in *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2012 ONSC 6083, in which Perell, J. broadened the concept of special circumstances to include "where the defendant is confronting a claim that he or she expected to confront if leave were granted." However, the case law has advanced since that time. *Celestica* has been overturned as part of a trilogy of cases appealed first to the Ontario Court of Appeal (*Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90) and, after the release of *S. M.* by the Supreme Court of Canada (*Canadian Imperial Bank of Commerce v. Green*, [2015] 3 SCR 801).

[36] In the *Green* trilogy, the Supreme Court of Canada stated that a court's jurisdiction to apply common law doctrines "is circumscribed by legislative intent." The doctrine of special circumstances was explained as follows:

> [113] In essence, the doctrine allows a court to temper the potentially harsh and unfair effects of limitation periods by allowing a plaintiff to add a cause of action or a party to the statement of claim after the expiry of the relevant limitation period. I hasten to add that, as the Court recognized in *Basarsky v. Quinlan*, 1971 CanLII 5 (SCC), [1972] S.C.R. 380, and as the word "special" — or "peculiar" — suggests, the circumstances warranting such an amendment will not often occur.

[37] The Supreme Court of Canada held that the doctrine did not apply to the cases under appeal, because the limitation period could not be defeated by amending the pleadings. Moreover, with respect to *Celestica* in particular, the Supreme Court of Canada stated the following:

> [117] In the case of *Celestica*, in which the limitation period expired before a motion for leave was even brought, applying the special circumstances doctrine to grant relief to the plaintiffs would necessarily provide judges with general authority to extend limitation periods, which would frustrate the purpose of s. 138.14 *OSA* […]

[38] To summarize, the jurisprudence at this point in time consistently establishes that:

(i) the doctrine of special circumstances may be applied, in certain circumstances, to amend pleadings (but not to establish a new claim) after the expiry of a limitation period;

(ii) the doctrine of special circumstances may not be applied to frustrate statutory limitation periods; and

(iii) more generally, equitable principles may not be applied in conflict with statutory direction.

[39] Thus, to the extent that the Tribunal may consider equitable principles and common law doctrines in appropriate circumstances, the application of these principles and doctrines is circumscribed by the relevant legislation. In no circumstances can these principles and doctrines be applied in a manner contrary to legislative intent, as expressed by statute. In the present appeal, allowing an extension of the time limit established by s. 66(2) of the DESDA would, as in *Joseph*, be contrary to the purpose of Part 5 of the DESDA by removing the certainty of its limitation scheme. As outlined previously, there is clear statutory direction in the form of a fixed, non-discretionary, limitation period. I find that it is not open to the Tribunal (whether at the General or Appeal Division) to flout that clear direction by permitting an application to rescind and amend beyond the statutory time limit, through the use of equitable principles or common law doctrines.

[40] I conclude, therefore, that the General Division did not err in law, but rather that it was correct, in determining that the Appellant's May 2015 rescind or amend application was statute-barred by virtue of s. 66(2) of the DESDA.

CONCLUSION

[41] The General Division failed to observe a principle of natural justice (the right to know the case to be met) by specifically seeking written submissions on s. 66(1)(*b*) without mentioning the time limit issue in s. 66(2). The Appellant has now had the opportunity to provide comprehensive submissions on the interpretation and application of s. 66(2) of the DESDA.

[42] The General Division did not err in law by determining that the application to rescind or amend was statute-barred.

[43] The General Division's decision was correct and, consequently the appropriate remedy under s. 59 of the DESDA is for me to confirm that decision. The application to rescind or amend is statute-barred, and there is no basis upon which the merits of the application can be considered.

[44] The Appellant's appeal is accordingly dismissed.

Shirley Netten
Member, Appeal Division