



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. F.H.*, 2018 SST 1191

Tribunal File Number: AD-16-1219

BETWEEN:

Minister of Employment and Social Development

Appellant

and

F. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 20, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The claim of F. H. (Claimant), under the *Canadian Charter of Rights and Freedoms* (Charter) is dismissed, and the remainder of the appeal is referred back to the General Division for consideration on its merits.

OVERVIEW

[2] The Claimant began receiving a Canada Pension Plan retirement pension in December 2010. In March 2013, he applied for a Canada Pension Plan disability pension. The Minister of Employment and Social Development (Minister) refused this application because the Claimant could not be deemed to have been disabled before his retirement pension began because he applied for the disability pension more than 15 months after he started receiving the retirement pension.¹

[3] The Claimant appealed this decision to the Social Security Tribunal and claimed that the *Canada Pension Plan* (CPP) provision that limits the retroactivity of a disability pension payment to 15 months violates his rights under section 15 of the Charter. The Tribunal's General Division then required the Claimant to file a notice of constitutional question and then had each party file a Charter record.² The Claimant filed a letter in response to this,³ and the Minister wrote to the Tribunal, asking whether the Claimant had complied with the requirements for the Charter record.⁴ The General Division issued a direction accepting the Claimant's Charter record as sufficient. The Minister then requested⁵ that the General Division to summarily dismiss the Claimant's Charter claim.⁶ The Tribunal's General Division refused to consider this request until

¹ The *Canada Pension Plan* and *Canada Pension Plan Regulations* currently provide that a claimant must be found to be disabled before they begin to receive a retirement pension in order to change a retirement pension to a disability pension, and also that a claimant cannot be deemed to be disabled 15 months before the time they applied for the disability pension.

² *Social Security Tribunal Regulations*, s 20(1)(a).

³ GD12.

⁴ GD15, GD17, GD20.

⁵ Section 4 of the *Social Security Tribunal Regulations* provides that a party may request the Tribunal to provide for any matter concerning a proceeding.

⁶ GD23.

the Minister had filed its Charter record because it was an attempt to reargue whether the Claimant's Charter record was compliant with the General Division's direction.⁷

[4] The Minister's appeal from this decision is allowed because the General Division failed to consider relevant legal principles when it responded to the Minister's request for a summary dismissal. The Claimant's Charter claim is dismissed because he did not comply with the General Division direction about what the Charter record should contain and he did not provide a sufficient factual or legal basis for the claim to be decided. The remainder of the claim is referred back to the General Division for consideration on its merits.

PRELIMINARY MATTERS

[5] This matter was scheduled to be heard by teleconference on March 13, 2018. At the hearing, counsel for the Minister requested additional time to provide written submissions on the legal issue of whether insufficiency of reasons for a decision is a "stand alone" ground of appeal on which the Appeal Division could intervene. Both parties were given until the close of business on Friday, March 23, 2018, to file written submissions on this issue.

[6] In written submissions received after the oral hearing of the appeal, the Claimant requested that the Minister's appeal be dismissed because the Minister's counsel joined the teleconference hearing late. This request is refused. While it is important that all parties comply with deadlines imposed by legislation and attend hearings on time, counsel joined the conference call shortly after the time set for the hearing. The parties had sufficient time to present their case fully at this hearing, and no party was prejudiced by the delay in its start.

[7] The Minister requested under section 4 of the *Social Security Tribunal Regulations* (Regulations) that the Claimant's claim under the Charter be summarily dismissed in accordance with section 53 of the *Department of Employment and Social Development Act* (DESD Act). I decided that the Minister was required to obtain leave to appeal the General Division decision that refused to summarily dismiss the Charter portion of the appeal. I decided this because reading sections 53 and 56 of the DESD Act together makes it clear that an appellant who is the appellant at both the General Division and the Appeal Division does not need to obtain leave to

⁷ GD24.

appeal from a summary dismissal decision. In this case, the Claimant was the appellant at the General Division, and the Minister is the appellant at the Appeal Division.

[8] However, the nature of the General Division decision before me is one of summary dismissal made under section 53 of the DESD Act. The appeal is considered in this context below.

ISSUE

[9] Did the General Division err in law when it refused to summarily dismiss the Claimant's Charter claim?

ANALYSIS

[10] The DESD Act governs the Tribunal's operation. The only grounds of appeal available are set out in section 58(1) of the DESD Act, namely that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. The parties' arguments on this appeal must be considered in this context.

Summary Dismissal

[11] The DESD Act also states that an appeal must be dismissed if it has no reasonable chance of success.⁸ The Tribunal's Appeal Division has interpreted this to mean that an appeal must be dismissed if it is bound to fail, no matter what arguments or evidence might be presented at a hearing.⁹ The Minister requested that the General Division summarily dismiss the Claimant's Charter claim because he did not comply with the General Division direction to file a Charter record and did not present evidence or arguments giving the Charter claim a reasonable chance of success.¹⁰

⁸ DESD Act, s 53(1).

⁹ *The Estate of J. B. v Minister of Employment and Social Development*, 2018 SST 564.

¹⁰ GD24.

[12] In response to this request, the General Division directed as follows:

Receipt of the [Minister's] request to summarily dismiss the charter [*sic*] challenge (GD23) is acknowledged. In the direction letter dated July 4, 2016 (GD21) the Tribunal determined that the [Claimant] has met his burden to provide a sufficient charter [*sic*] record and that the [Minister] is to deliver its charter [*sic*] record by October 15, 2016.

The request to summarily dismiss is an attempt to reargue the same issue that has already been determined by the Tribunal in its direction letter. The request to summarily dismiss will not be considered until after the [Minister] has delivered its charter [*sic*] record....¹¹

[13] The General Division erred in law. It failed to turn its mind to the legal requirements for summary dismissal in the DESD Act. The decision does not even suggest that the General Division considered whether the appeal had a reasonable chance of success. Instead, its decision was based on the Minister's attempt to reargue an issue. Whether the same issue is being reargued is not relevant to the test for summary dismissal. The appeal must therefore be allowed.

REMEDY

[14] The DESD Act sets out the remedies that the Appeal Division can give when an appeal is allowed.¹² In this case, it is appropriate that the Appeal Division give the decision that the General Division should have given. The written record is complete. The parties have made comprehensive submissions on the issues both in writing and at an oral hearing. The facts are not in dispute. There has also been a significant delay in this matter.

[15] The DESD Act states that the General Division must summarily dismiss an appeal if it has no reasonable chance of success. The Regulations state that notice must be given in writing to the appellant before an appeal is summarily dismissed.¹³ The language of the DESD Act and the Regulations refers to an entire appeal being dismissed, not a portion of an appeal (for example, a claim based on a breach of a Charter right). Therefore, requesting a summary dismissal is not the appropriate way to challenge the General Division's direction on the sufficiency of the Claimant's Charter record. The proper procedure is for the Minister to appeal

¹¹ GD24

¹² DESD Act, s 59.

¹³ Regulations, s 22.

the General Division's direction to the Appeal Division under the DESD Act. As a result, the Minister's request that the Charter claim be summarily dismissed is denied.

[16] However, that is not the end of it. In written submissions for the appeal, the Minister argues that the remedy it really asked for was that the Claimant's Charter claim be dismissed because his Charter record was deficient.¹⁴ I am satisfied that this is an issue to be decided on appeal.¹⁵

The Charter Record

Sufficiency of the Charter record

[17] The Regulations set out procedures for appeals. They state that, if the constitutional validity of any provision of the CPP is to be put in issue before the Tribunal, the party raising the issue must file a notice that sets out the legislative section that is at issue and contains any submissions in support of the issue.¹⁶ The Claimant asserts that the 15-month maximum retroactivity provision of the CPP¹⁷ discriminated against him on the basis of disability. He included arguments that explained this in his notice.¹⁸

[18] After the Claimant filed this notice with the Tribunal, the General Division directed the parties to file Charter records with the Tribunal.¹⁹ The Federal Court instructs that the General Division has legal authority to require parties to file a Charter record - the Regulations permit the Tribunal to direct the parties to file documents and submissions.²⁰ The General Division required that the Claimant's Charter record and the Minister's responding Charter record set out the relevant facts, explain the constitutional breach, provide evidence to support the constitutional question, and specify the remedy sought. Furthermore, the General Division stated that the failure to provide the required information may result in the appeal being treated as a regular appeal and the Claimant being precluded from arguing his Charter claim.

¹⁴ AD2-13 to AD2-17; GD21.

¹⁵ DESD Act, s 64(1).

¹⁶ *Social Security Tribunal Regulations*, s 20(1)(a).

¹⁷ CPP, s 42(2)(b).

¹⁸ GD 12 and GD 19.

¹⁹ GD11.

²⁰ *Canada (Attorney General) v Stewart*, 2018 FC 768.

[19] The Claimant did not provide evidence to support the constitutional breach or set out the remedy requested, so he did not comply with the General Division's direction. The Minister wrote to the Tribunal on four occasions and requested clarification about whether the Claimant had complied with this direction.²¹ The General Division found that the Claimant's Charter record was sufficient. It wrote:

After a careful review the file materials the Tribunal has determined that in his responses GD12 and GD19, the [Claimant] has met his burden to provide a sufficient charter [*sic*] record. He has identified the provisions of the CPP that he is challenging and has set out submissions in support. The other issues raised by the [Minister] relate to the merits of the [Claimant's] charter challenge, which should be determined at a hearing after the [Minister's] record has been filed.²²

[20] The General Division's decision to treat the Claimant's appeal as a Charter challenge even though he had not filed a complete Charter record was a discretionary decision. The Federal Court of Appeal teaches that a decision-maker must exercise its discretion in a judicial manner. To decide whether this has been done, one must ask whether the decision-maker:

- acted in bad faith;
- acted for an improper purpose or motive;
- took into account an irrelevant factor;
- ignored a relevant factor; or
- acted in a discriminatory manner.²³

[21] When it decided that the Claimant's Charter record was sufficient, the General Division did not consider the Claimant's Charter record or whether it complied with the General Division direction. The decision sets out no basis for the finding that the Claimant's record was sufficient despite its non-compliance with the General Division's direction. Therefore, the General Division improperly exercised its discretion. This is an error in law.

²¹ GD13, GD15, GD17, GD20.

²² GD 21.

²³ *Canada (Attorney General) v Purcell*, 1995 CanLII 3558.

[22] The Minister also contends that the decision that the Claimant's Charter record was sufficient was wrong in law because the Charter record does not comply with the requirements set out in Court decisions. The Minister relies on the Ontario Court of Appeal instruction that it is not unreasonable to insist on the applicant's crystallization of the issue so that the Minister can understand and respond to it.²⁴ Similarly, the Federal Court of Appeal teaches that decisions involving the Charter must not be made in a factual vacuum.²⁵ The Minister argues that this means that a claimant must provide a sufficient factual basis for the Charter claim so that the Minister and the Tribunal can understand what legislative provision is called into question and the basis for the claim under the Charter.

[23] The Claimant argues that the "kit" for disability pension does not state that there is a maximum period of retroactivity preventing anyone who has received a retirement pension for 15 months or more from receiving a disability pension. In such circumstances, this leads to the disability claim being dismissed on the basis of the passage of time. He claims that this has an adverse impact on those who would otherwise meet the criteria to be disabled.

[24] While this argument is clear, it does not address claimants' legal requirements for prosecuting a claim under section 15 of the Charter. To succeed on a discrimination claim under the Charter, a claimant must establish that there is a distinction between the claimant and others based on enumerated or analogous grounds set out in the Charter and that, because of this distinction, the claimant was denied a benefit or must carry a heavier load, while bearing in mind that not all differential treatment is discriminatory.²⁶ The Claimant failed to provide any factual basis for the argument that he was a member of a group that was subject to a distinction based on an enumerated or analogous Charter ground. He did not provide any evidence that might establish what the impact of being differentially treated is. While some of this information may be presented at a hearing of the appeal, the Claimant did not provide any basis for his Charter claim. This prevents the Minister from knowing the case that it has to meet and from responding to the claim in any meaningful way. The General Division did not consider this when it decided that the Charter record was sufficient and therefore erred in law.

²⁴ *Re Danson and Attorney-General of Ontario*, 1987 CanLII 4068.

²⁵ *Bekker v Canada*, 2004 FCA 186.

²⁶ *J.J. and M. J. v Minister of Human Resources and Skills Development*, 2014 SSTAD 176.

[25] The Claimant also argues that the Tribunal has the authority, under the Regulations, to dispense with compliance with a provision. I presume that he is referring to the requirement to provide a full Charter record. While this is true, the General Division did not base its decision on a waiver of its own requirements. Therefore, this argument fails.

Natural justice

[26] The principles of natural justice are concerned with ensuring that all parties to a legal proceeding have an opportunity to present their case, to know and answer the case against them, and to have a decision made by an impartial decision-maker based on the law and the facts. The Minister contends that, because the Claimant did not provide a sufficient Charter record, it cannot know the case that it has to meet; it cannot properly respond to the Claimant's arguments because it does not know the basis on which they are made.

[27] The Claimant has not set out a full factual basis for his claim under the Charter. He has not indicated what group he is a member of based on an enumerated or analogous ground in the Charter, or what the impact of the alleged differential treatment is. In addition, the Claimant has not set out what remedy he is seeking as a result of the alleged discrimination. Therefore, the Minister cannot reasonably be expected to know what case it has to meet. The decision to accept the Charter record as sufficient was an improper exercise of discretion by the General Division. This results in a breach of a principle of natural justice.

[28] Finally, the Minister argues that, by requiring the Minister to file its own Charter record, the General Division also, in effect, reversed the burden of proof. Because the Claimant's record was deficient, the General Division effectively required the Minister to prove that the Claimant's Charter rights had not been breached, when the Claimant is the party who had to prove that his Charter rights were violated. However, requiring that parties file documents that support their legal position does not change the burden of proof. It is for each party to decide what materials are to be filed and to do so. The appeal fails on this basis.

Sufficiency of reasons

[29] The DESD Act requires that the General Division provide written reasons for its decisions. The Supreme Court of Canada teaches that written reasons must be sufficient to

permit appellate review of the decision and to allow the reader to understand what decision was made and why it was made.²⁷ In this case, the General Division did not provide sufficient reasons for its decision. The General Division directed the parties to file a Charter record and stated specifically what that had to include. This direction also states that, if a full record is not filed with the Tribunal, the appeal may be treated as a regular appeal and the Charter claim will not be considered.

[30] However, when the General Division decided that the record was sufficient, it gave no meaningful reasons for reaching this decision. It does not address the Claimant's failure to comply with the Tribunal's direction concerning what was to be included in the Charter record or why the Claimant's record was sufficient without the required information. The reader is unable to understand why this decision was made.

[31] Therefore, the reasons for the General Division decision are insufficient. This is an error in law.²⁸

CONCLUSION

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

[33] The Minister's request that the Claimant's Charter claims be summarily dismissed is denied because that is not the proper procedure for challenging the sufficiency of a Charter record.

[34] The Claimant's Charter claim is dismissed because he failed to comply with the General Division's direction regarding his Charter record. He did not provide a sufficient factual basis on which the claim could be adjudicated, nor did he address the legal requirements to prosecute a claim under section 15 of the Charter.

²⁷ *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

²⁸ *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292.

[35] The appeal, excluding the Charter argument, is referred back to the General Division for consideration on its merits.

Valerie Hazlett Parker
Member, Appeal Division

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| HEARD ON: | March 13, 2018 |
| METHOD OF PROCEEDING: | Teleconference and written submissions |
| APPEARANCES: | F. H., Respondent Sylvie Doire, Counsel for the Appellant |