



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Minister of Employment and Social Development v. C. T.*, 2018 SST 1274

Tribunal File Number: AD-16-1148

BETWEEN:

**Minister of Employment and Social Development**

Appellant

and

**C. T.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 6, 2018

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed.

[2] The appeal is referred back to the General Division with directions.

### OVERVIEW

[3] The Claimant began to receive a Canada Pension Plan retirement pension in September 2013. He later applied for a Canada Pension Plan disability pension, which the Minister of Employment and Social Development (Minister) refused. The Claimant appealed this decision to the Social Security Tribunal.

[4] Under the *Canada Pension Plan* (CPP), for a claimant to replace a retirement pension with a disability pension, they must establish that they were disabled before they began to receive the retirement pension.<sup>1</sup> Therefore, to succeed on appeal, the Claimant has to establish that he was disabled on or before August 31, 2013. However, if he had not been receiving the retirement pension, he would have to establish that he was disabled on or before December 31, 2016, to receive the disability pension (see sections 70(3) and 61.1 of the CPP).

[5] The Claimant argues that sections 70(3) and 61.1 of the CPP violate his rights under section 15 of the *Canadian Charter of Rights and Freedoms* (Charter) because his age and the fact that he is receiving early retirement benefits change the date by which he must establish that he was disabled; he argues that this is discriminatory. The Claimant served a notice of constitutional question, as required under the *Social Security Tribunal Regulations* (Regulations), to proceed with the Charter claim. The General Division then directed the Minister to file a Charter record by a specified date.

[6] The Minister did not file a Charter record, but it did request that the General Division summarily dismiss the Claimant's appeal. The General Division refused this request. The Minister appeals this General Division decision on the basis that the General Division erred in law by refusing to summarily dismiss the Charter claim and failed to observe the principles of

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<sup>1</sup> *Canada Pension Plan* ss 61.1 and 70(3)

natural justice. The appeal is allowed because the General Division erred in law when it failed to consider the legal test for summary dismissal. The request to summarily dismiss the Charter portion of the appeal is refused. The appeal is referred back to the General Division with directions regarding material to be presented for the Charter claim and for all other issues to be considered.

## **PRELIMINARY MATTER**

[7] The Minister made the request under section 4 of the Regulations that the Claimant's Charter claim be summarily dismissed under section 53 of the *Department of Employment and Social Development Act* (DESD Act) and that the appeal also be summarily dismissed because, without any Charter claim, the appeal has no reasonable chance of success. 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 and the appeal on its merits. This was 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 leave to appeal 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.

## **ISSUE**

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

## **ANALYSIS**

[9] The DESD Act governs the Tribunal's operation. It provides only three grounds of appeal that the Appeal Division can consider, 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.<sup>2</sup> The Minister's arguments on appeal must be considered in this context.

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<sup>2</sup> DESD Act s. 58(1)

## Summary Dismissal

[10] The DESD Act requires that the General Division summarily dismiss an appeal if it has no reasonable chance of success.<sup>3</sup> The Minister requested that the General Division summarily dismiss the Charter portion of this appeal because the Claimant failed to file a Charter record that contained a sufficient evidentiary foundation for his claim,<sup>4</sup> and therefore the appeal had no reasonable chance of success. The General Division refused this request with written reasons:

Summary dismissal is not an appropriate procedure. The [Minister] is asking the Tribunal to weigh, at this stage, the sufficiency of the evidentiary basis for the [Claimant's] charter [*sic*] challenge. The Appeal Division decisions have made clear that a weak case is not appropriate for summary disposition since it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it.<sup>5</sup>

[11] The DESD Act sets out the legal test that must be met for a claim to be summarily dismissed—that it has no reasonable chance of success. This has been interpreted to mean that an appeal should be summarily dismissed if it is plain and obvious on the record that the appeal is bound to fail, regardless of the evidence or arguments that might be presented at a hearing.<sup>6</sup> The General Division failed to consider whether the appeal had no reasonable chance of success, and it makes no finding on this issue. This is an error in law. The appeal must therefore be allowed.

## REMEDY

[12] The DESD Act sets out the remedies that the Appeal Division can give when an appeal is allowed.<sup>7</sup> It also gives the Tribunal authority to decide questions of law and fact that are necessary to dispose of an appeal.<sup>8</sup> In this case, it is appropriate for the Appeal Division to 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.

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<sup>3</sup> *Ibid.* s 53.

<sup>4</sup> GD17.

<sup>5</sup> GD18.

<sup>6</sup> *The Estate of J.B. v Minister of Employment and Social Development*, 2018 SST 564; *Papouchine v Canada (Attorney General)*, 2018 FC 1138.

<sup>7</sup> DESD Act s 59(1).

<sup>8</sup> *Ibid.* s.64

[13] 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.<sup>9</sup> The language of the DESD Act and the Regulations refers to an entire appeal to be dismissed, not a portion of an appeal (for example, a claim based on a breach of a Charter right). The DESD Act also gives parties a right of appeal from a General Division decision to the Appeal Division.<sup>10</sup> Therefore, a request for summary dismissal is not the appropriate way to challenge the General Division's decision regarding the Claimant's Charter record. The proper procedure is for the Minister to appeal the General Division's decision to the Appeal Division under the DESD Act. As a result, the Minister's request that the Charter claim be summarily dismissed is refused.

[14] However, that is not the end of it. The Minister's request that the Claimant's Charter claim be summarily dismissed because no Charter record was filed is really an attempt to challenge the General Division's direction that only the Minister had to file a Charter record, and its decision that the Claimant had produced a sufficient factual basis for the Charter claim. I am satisfied that these are issues to be decided on appeal.

### **The Charter Record**

[15] The Minister argues that the General Division erred in law and failed to observe the principles of natural justice because it failed to require the Claimant to file a Charter record. These arguments are considered below.

### **Error in Law**

[16] A claim that a Charter right has been violated is a serious one, and consequently different procedures come into play when such a claim has been made. The Regulations require that a party who makes a Charter claim must file a notice of constitutional question that sets out the legislative provision that is being challenged and contains any submissions in support of the issue.<sup>11</sup> The General Division concluded that the Claimant had complied with the Regulations

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<sup>9</sup> Regulations s 22.

<sup>10</sup> DESD Act s 53(3).

<sup>11</sup> Regulations s 20.

regarding his notice of constitutional question.<sup>12</sup>The General Division required that only the Minister file a Charter record, although it did not specify what that record should contain. The Minister argues that the General Division erred in law by not requiring a Charter record from the Claimant.

[17] The Federal Court teaches that the Regulations also grant the General Division discretion to order a Charter record; it can “direct the parties” to file documents and submissions.<sup>13</sup> This is in keeping with the teaching from the Supreme Court of Canada that Charter issues cannot be decided in a vacuum and must have a sufficient evidentiary basis to be adjudicated.<sup>14</sup> However, nothing states what form that evidentiary basis is to take or whether the information can be provided in the notice of constitutional question, in a Charter record, or in any other documents filed with the Tribunal.

[18] In addition, the Federal Court teaches that nothing limits the General Division’s discretion with regard to ordering that a Charter record be provided.<sup>15</sup> Logically then, the General Division is not required to order all parties to file a Charter record in every case. There is no suggestion that the General Division improperly exercised its discretion. It made no error in law.

[19] The Claimant’s notice of constitutional question identifies the legislation that is challenged, the grounds on which this is done, and arguments that support his position. However, the Supreme Court of Canada teaches that a claimant must also provide enough evidence to show a *prima facie* breach of section 15 of the Charter and that while the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct.<sup>16</sup> There must be some evidence that points to a link between the legislative requirement in question and a disparate impact on the basis of an enumerated or analogous Charter ground.<sup>17</sup>

[20] The Claimant has not provided this. He claims that “if the Tribunal finds that he was not disabled in August 2013 but is currently disabled, he will be denied a benefit which a younger

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<sup>12</sup> GD18-1

<sup>13</sup> *Canada (Attorney General) v Stewart*, 2018 FC 768.

<sup>14</sup> *Mackay v Manitoba*, [1989] 2 SCR 357.

<sup>15</sup> *Stewart*, *supra* note 15.

<sup>16</sup> *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548, 2015 SCC 30.

<sup>17</sup> *Ibid.*

person with the same disability will receive.”<sup>18</sup> The statements in his notice of constitutional question do not provide a sufficient factual basis upon which the matter can be adjudicated. He has not presented a *prima facie* case of discrimination under section 15 of the Charter. Therefore, it is appropriate to require further documents so that he can present this.

### **Natural Justice**

[21] The Minister also argues that the refusal to summarily dismiss the Charter claim was a breach of the principles of natural justice. These principles are concerned with ensuring that parties to a legal dispute have the opportunity to present their case, to know and answer the case against them, and to have the matter decided by an impartial decision-maker based on the law and the facts. The Claimant’s notice sets out his claim: sections 70(3) and 61.1 of the CPP are discriminatory based on his age and receipt of retirement benefits. Again, this is insufficient. The Minister cannot know the case that it has to answer because it is not clear what the disparate impact of the legislation is on the Claimant or what group he is a member of that falls within a Charter ground.

### **The Onus of Proof**

[22] The law is clear that a party who advances a Charter claim must prove that their rights have been violated. If they succeed in doing so, the Minister must then prove that the impugned legislation is justified under section 1 of the Charter. By requiring that only the Minister file a Charter record, the General Division did not reverse the burden of proof. Again, the filing of a Charter record is not required under the DESD Act or the Regulations. The Regulations give the Tribunal discretion to require a record, without any restrictions on what that record might contain.<sup>19</sup> Requiring one party to file a Charter record when the other party has already filed information that would otherwise be included in the record does not change the Claimant’s burden to prove his case.

[23] It is for the Minister to prepare its Charter record as part of its case and to decide what that record contains. This may include submissions on any legal issues that are relevant,

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<sup>18</sup> GD12-5.

<sup>19</sup> Regulations s 20(3); *Stewart supra* note 15.

information that establishes that there has been no breach of a Charter principle, or that any impugned provision is saved by section 1 of the Charter. Requiring that the Minister file a record that addresses certain issues does not reverse the onus of proof.

[24] The General Division made no error in this regard.

**CONCLUSION**

[25] The appeal is allowed.

[26] The Minister’s request that the Charter claim be summarily dismissed is refused.

[27] The appeal is referred back to the General Division for reconsideration, with the following direction: Within 75 days of the date of this decision, the Claimant may file a record comprising supporting evidence and submissions that:

- a) Set out the relevant facts and explain the claimed Charter breach;
- b) Specify the remedy he is seeking; and
- c) Provide evidence to support the claimed Charter breach (such as affidavits and expert evidence) and submissions including relevant case law.

[28] The General Division may give the Minister an opportunity to respond. It shall then decide whether the Claimant has presented a sufficient factual basis upon which the Charter claim can be decided.

[29] The General Division must also consider the appeal on its merits.

Valerie Hazlett Parker  
Member, Appeal Division

HEARD ON:	March 14, 2018
METHOD OF PROCEEDING:	Teleconference



APPEARANCES:	C. T., Respondent  Laura Veniot, Counsel for the Respondent  Sandra Doucette, Counsel for the Appellant
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