



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. S. v. Canada Employment Insurance Commission*, 2016 SSTADEI 305

Tribunal File Number: AD-15-420

BETWEEN:

B. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON May 12, 2016

DATE OF DECISION: June 14, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On June 3, 2015, the General Division of the Tribunal determined that:

- The Appellant was paid parental benefits in accordance with section 23 of the *Employment Insurance Act* (the “Act”). Parental benefits were paid, during the 52 week window period, in accordance with section 23(2) of the *Act*. The Appellant did not meet the exception, for an extension or a deferral of the benefit period, pursuant to subsection 23(3) of the *Act*, because the child was not hospitalized.

[3] The Appellant requested leave to appeal to the Appeal Division on July 2, 2015. Leave to appeal was granted by the Appeal Division on January 12, 2016.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue under appeal;
- The fact that the credibility of the parties is not anticipated being a prevailing issue;
- The information in the file, including the need for additional information;
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was present at the hearing and was represented by James Struthers. The Respondent was represented by Carole Vary.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act (the “DESD Act”)* states that the only grounds of appeal are the following:

- 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.

ISSUES

[7] The Tribunal must decide the following issues:

- a) Did the General Division refuse to exercise its jurisdiction regarding a *Canadian Charter of Rights (the “Charter”)* challenge?
- b) If not, can the Appellant raise the *Charter* issue for the first time before the Appeal Division?

ARGUMENTS

[8] The Appellant submits the following arguments in support of his appeal:

- Section 23 of the *Act* clearly has a principle that if a parent cannot take their child at birth because of some legitimate reason (pending adoption, hospital stay or parent off to war) then only until placement can be made does the limiting time period kick in;

- Instead of wording the provision to reflect that principle, it allows only 3 things - any other situation is excluded which is very unfair and discriminatory to anyone who falls outside;
- Notice was sent to the Tribunal that the Appellant intended to contest the constitutional validity of section 23 (1) and (2) of the *Act* as being discriminatory contrary to section 15(1) of the *Charter of Rights* and in particular the right to equal protection and benefit under the law and to seek declaratory relief under section 24 (1) of the *Charter* and section 52. (1) part VII of the *Constitution Act, 1982*;
- The purpose of parental benefits is to allow parents time to care for and bond with their children. With the provisions of subsections 23(1) and (2) of the *Act*, natural parents are needlessly treated differently if their child is not placed into their custody at birth, which amounts to discrimination;
- Although he did not raise the *Charter* issue directly at the hearing before the General Division, he did indirectly raise the issue of discrimination;
- The representative of the Appellant accepts full responsibility for his omission to raise directly before the General Division the issue of the *Charter* and as a result the Appellant has not had a fair hearing and an opportunity to fully present his case. The appropriate relief under the circumstances is to return the matter to the General Division for a determination of the *Charter* argument;
- If the Appeal Division does not have jurisdiction to hear a *Charter* challenge for the first time, the file should be sent back to the General Division.

[9] The Respondent submits the following arguments against the appeal:

- The *Charter* arguments should not be entertained for the first time in an appeal before the Appeal Division;

- The issue of discrimination does not appear in the Appellant's or the Respondent's written submissions to the General Division;
- On July 2, 2015, the Appellant filed an application to appeal the General Division decision to the Appeal Division. This application was considered to be an application for leave to appeal by the Appeal Division. The Appellant's written submissions contained the phrase "any other situation is excluded which is very unfair and discriminatory to anyone who falls outside";
- While there is case law that suggests that a constitutional argument could be raised for the first time on appeal and not at the first instance, the circumstances in which this is allowed are rare. The discretion of a Court to do this is not exercised routinely or lightly;
- When the issue has not been properly raised in the courts below, it becomes a matter for the Court's discretion, taking into account all of the circumstances including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice;
- The Appellant's *Charter* argument would need to be substantiated by an evidentiary record;
- Furthermore, if the Appeal Division were to find a breach of the *Charter*, the Respondent would be prejudiced by the fact that it was not able to lead evidence at the General Division that a breach is justified under section 1 of the *Charter*.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that an appeal at the Appeal Division is not a judicial review but a circumscribed review of the decision of the General Division. The grounds of

review are limited by section 58(1) of the *DESD Act – Canada (AG) c. Jean*, 2015 FCA 242.

[12] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that when the Appeal Division acts “as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court”.

[13] The Federal Court of Appeal further indicated that “not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of “federal boards”, for the Federal Court and the Federal Court of Appeal”.

[14] The Court concluded that when the Appeal Division “hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that *Act*”.

[15] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada*, 2015 FCA 274.

[16] Unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

ANALYSIS

[17] In the present appeal, the Appellant is no longer contesting the decision of the General Division and its interpretation of section 23 of the *Act* but submits that his section 15 rights under the *Charter* have been violated as a member of a group of persons who are natural parents that are unable to look after their child at birth.

[18] Therefore, the issues before the Tribunal are the following:

- a) Did the General Division refuse to exercise its jurisdiction regarding a *Charter* challenge?
- b) If not, can the Appellant raise the *Charter* issue for the first time in appeal?

Did the General Division refuse to exercise its jurisdiction regarding a Charter challenge?

[19] The Tribunal requested a copy of the hearing before the General Division in order to examine if the General Division had refused to exercise its jurisdiction regarding a *Charter* challenge. Unfortunately, the Tribunal was advised by the General Division that the recording was not available. The parties were informed of the situation and invited to file further submissions before June 10, 2016. The Tribunal received and considered further submissions from both parties.

[20] Before the General Division, the Appellant vigorously argued that the crux of the issue was that the placement of the child in a specialized foster care was similar to being hospitalized and that section 23 of the *Act* should be more liberally interpreted to encompass exceptional circumstances such as those experienced by the Appellant.

[21] When asked by the Tribunal if he had raised a *Charter* challenge before the General Division, the representative stated on more than one occasion that he did not raise the *Charter* challenge before the General Division and that if he had known about it then, he would have argued it. He did not know at that time that he could argue a section 15 of the *Charter* breach but he did argue it indirectly by saying that the Appellant was treated differently than adoptive or military parents.

[22] Unfortunately for the Appellant, the Tribunal is not convinced by the above representations that the *Charter* issue was properly raised before the General Division and that it refused to exercise its jurisdiction.

Can the Appellant raise the Charter issue for the first time in appeal?

[23] The general rule is that, except in cases of urgency, constitutional questions cannot be raised for the first time in the reviewing court if the administrative decision-maker under review had the power and the practical capability to decide them – *Erasmus v. Canada (AG)*, 2015 FCA 129.

[24] There is no doubt that the General Division had the power and the practical capability to decide the present constitutional question. The Tribunal finds that there is no urgency in the present case, as interpreted by case law, that would justify a derogation to the general rule.

[25] The Supreme Court has strongly endorsed the need for constitutional issues to be placed first before an administrative decision-maker who can hear them: *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16 (CanLII), [2005] 1 S.C.R. 257 at paragraphs 38-40. Where, as here, an administrative decision-maker can hear and decide constitutional issues, that jurisdiction should not be bypassed by raising the constitutional issues for the first time in appeal.

[26] The Tribunal also finds that the evidentiary record should have been submitted to the General Division since it represents the right forum to present factual foundations for such an argument. By doing so, the Attorney General would have been given the opportunity to contribute to the factual record without prejudice to any parties.

[27] Contrary to the representations of the Appellant, the Tribunal is of the view that the evidentiary record before the Appeal Division is simply insufficient to decide a section 15 *Charter* issue.

CONCLUSION

[28] Since the appeal was solely on the *Charter* issue, the appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division