

[TRANSLATION]

Citation: *J. C. v. Minister of Employment and Social Development*, 2015 SSTAD 596

Date: May 13, 2015

File number: AD-15-74

APPEAL DIVISION

Between:

J. C.

Applicant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)**

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

Decision made on the record on May 13, 2015

REASONS AND DECISION

INTRODUCTION

[1] On January 19, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) summarily dismissed the Appellant's appeal. The General Division found that:

- (a) The Appellant's reference to the *Canadian Charter of Rights and Freedoms* (Charter) was not followed by information that met the requirements of paragraph 20(1)(a) of the *Social Security Tribunal of Canada Regulations* (Tribunal Regulations);
- (b) The Appellants' other arguments did not relate to the Charter;
- (c) The Appellant's old age security (OAS) pension had to be suspended as of July 2011 because he was incarcerated; and
- (d) In the circumstances, his appeal had no reasonable chance of success.

[2] On February 17, 2015, the Appellant appealed to the Tribunal's Appeal Division on the ground that the General Division had not considered the Charter arguments he had raised in his letter of January 12, 2015. More specifically, the reasons given by the Appellant for his appeal to the Appeal Division are as follows:

- (a) [translation] "I want to continue my appeal";
- (b) At page 5, no. 14, of the General Division's decision, [translation] "you state that my arguments do not relate to the Charter";
- (c) In his letter of January 12, 2015, he refers to his Charter arguments (copy attached); and
- (d) He is pursuing his appeal for his entitlement to his pension starting on July 25, 2011, his 65th birthday, [translation] "based on my Canadian citizenship and pursuant to the Charter".

[3] The Tribunal requested that the parties make written submissions. The Appellant submitted a letter dated March 23, 2015. The Respondent filed submissions on May 1, 2015.

The Appellant's submissions refer to the Charter. The Tribunal asked the Appellant to provide information in accordance with paragraph 20(1)(a) of the Tribunal Regulations, and he replied by letter dated January 12, 2015.

[4] The General Division made a decision by way of summary dismissal on January 19, 2015.

[5] This appeal proceeded as a hearing on the record for the following reasons:

- (a) The fact that neither party requested an in-person hearing or a hearing by teleconference or videoconference; and
- (b) The need to proceed as informally and quickly as possible according to the Tribunal Regulations, having regard to the circumstances and considerations of fairness and natural justice.

ISSUE

[6] The Tribunal must determine whether it should dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division or confirm, rescind or vary the decision.

THE LAW AND ANALYSIS

Standard of review

[7] The Respondent submits that:

- (a) The applicable standard of review for questions of fact and questions of mixed fact and law is reasonableness.
- (b) For questions of law, the Appeal Division does not owe deference to the decisions of the General Division and must apply the correctness standard.

- (c) Since the main issue involves the application of the law to the facts (and is therefore a question of mixed fact and law), the standard of review that applies in this case is reasonableness.

[8] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a Tribunal decision on questions of jurisdiction or law is correctness:

Dunsmuir v. New Brunswick, 2008 SCC 9, cited by *Atkinson v. Canada (AG)*, 2013 FCA 187.

The standard of review applicable to questions of mixed fact and law is reasonableness:

Atkinson v. Canada (AG), 2013 FCA 187.

Legislative provisions

[9] Subsection 53(1) of the *Department of Employment and Social Development Act* provides that the General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[10] Under subsection 58(1) of the *Department of Employment and Social Development Act*, 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.

[11] The Tribunal's Appeal Division must be able to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is an error of law, fact or jurisdiction that may lead to the setting aside of the decision attacked.

[12] The *Old Age Security Act* (OAS Act) was amended so that the OAS pension, the GIS and the allowance are no longer paid during periods of incarceration, effective January 1, 2011. Subsection 5(3) of the OAS Act provides as follows:

Incarcerated persons

(3) No pension may be paid in respect of a period of incarceration — exclusive of the first month of that period — to a person who is subject to a sentence of imprisonment

(a) that is to be served in a penitentiary by virtue of any Act of Parliament; or

(b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered into an agreement under section 41 of the *Department of Human Resources and Skills Development Act*.

Legal test for summary dismissal

[13] The Appellant refers to the following grounds of appeal without citing the relevant paragraphs of subsection 58(1) of the *Department of Employment and Social Development Act*: failure to observe a principle of natural justice (the decision was summarily dismissed without consideration of his Charter arguments) and an error of law or of mixed fact and law (suspension of his old age pension).

[14] The initial determination concerns the suspension of the Appellant's old age pension, but this is not the preliminary matter that must be dealt with by the Appeal Division. The first matter to be determined is whether the General Division correctly identified and applied the legal test for summarily dismissing the appeal.

[15] I note that the Appellant is not represented and did not make submissions concerning the applicable legal test. The Respondent notes in its submissions that section 53 of the *Department of Employment and Social Development Act* sets out the test for summary dismissal and that the General Division correctly stated the applicable test (namely whether the appeal had a reasonable chance of success).

[16] Although the Federal Court of Appeal has not yet considered the question of summary dismissal in the context of the Tribunal's legislative and regulatory framework, it has considered this question on several occasions in the context of its own summary dismissal procedure. *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, and *Breslaw v. Canada (AG)*, 2004 FCA 264, serve as representative examples of such judgments.

[17] In *Lessard-Gauvin*, the Court stated:

The standard for a preliminary dismissal of an appeal is high. This Court will only summarily dismiss an appeal if it is obvious that the basis of the appeal is such that the appeal has no reasonable chance of success and is clearly bound to fail. . . .

[18] The Court expressed similar sentiments in *Breslaw*, finding that:

. . . the threshold for the summary dismissal of an appeal is very high, and while I have serious doubt about the validity of the appellant's position, the written representations which he has filed do raise an arguable case. The appeal will therefore be allowed to continue.

[19] I note that the determination to summarily dismiss an appeal is a threshold test. It is not appropriate to consider the case on the merits in the parties' absence and then find that the appeal cannot succeed. The question to be asked for summary dismissal is as follows: Is it plain and obvious on the record that the appeal is clearly bound to fail?

[20] For further clarity, the question to be asked is not whether the appeal must be dismissed after considering the facts, the case law and the parties' arguments. Rather, it must be determined whether the appeal is bound to fail regardless of the evidence or arguments that might be submitted at a hearing.

Decision of the General Division

[21] The General Division received an appeal request in the form of a letter dated January 28, 2012, which stated the following reasons:

[Translation]

This letter concerns the amount of \$533.00. You state in your letter that you have reviewed information from the federal government indicating that I was incarcerated in July 2011. I was incarcerated in March 2006, so I am entitled to my retirement pension.

You also state that the government now limits old age security benefit payments to persons incarcerated for a term of two years or more. There is a federal statute providing that any income is reduced by only 25%.

[22] The General Division sent notice of its intention to proceed by summary dismissal on September 22, 2014. By letter dated October 17, 2014, the Appellant objected to that notice by referring to the Charter, specifically stating:

[Translation]

Under the Canadian Charter of Rights and Freedoms, and based on my Canadian citizenship, I am entitled to reimbursement of my pension since 2011. . . .

[23] On December 4, 2014, the General Division asked the Appellant to confirm that he intended to bring an appeal based on the Charter by complying with the requirements set out in paragraph 20(1)(a) of the Tribunal Regulations. It gave him until January 16, 2015, to comply with that request.

[24] In reply, the Appellant wrote a letter dated January 12, 2015. He reiterated his entitlement to the pension [translation] “based on my Canadian citizenship and pursuant to the Charter. . .”. The Appellant confirmed that he intended to appeal based on the Charter, but he did not comply with the requirements set out in paragraph 20(1)(a) of the Tribunal Regulations.

[25] The General Division summarily dismissed the appeal on January 19, 2015.

[26] The General Division’s decision notes the following:

[Translation]

[12] In accordance with section 22 of the Tribunal Regulations, the Appellant was given notice in writing that the General Division intended to summarily dismiss the appeal (notice). The notice allowed the Appellant a reasonable period of time to make his submissions. In reply to the notice, the Appellant referred to the *Canadian Charter of Rights and Freedoms* (Charter). The Tribunal then asked the Appellant to provide information in accordance with paragraph 20(1)(a) of the Tribunal Regulations. The Tribunal also informed the Appellant that, if the requirements of paragraph 20(1)(a) were not met by the deadline, his appeal would be treated as an ordinary appeal and would be summarily dismissed for the reasons stated in the notice.

[13] The Appellant's reply dated January 12, 2015 (GT5) did not meet the requirements of paragraph 20(1)(a). He did not specify a legislative provision or make arguments on a constitutional issue.

[14] The Tribunal therefore notes the following arguments made by the Appellant. They do not relate to the *Charter*:

(a) Payment of his OAS pension must start in July 2011, when he reached 65 years of age;

(b) Following the end of his incarceration in July 2014, the Respondent owes him his entire OAS starting in July 2011;

(c) His entire OAS pension is taken away during his period of incarceration. However, a federal statute provides that any income is reduced by only 25%. Therefore, the amount received in August 2011, and the amount suspended by the Respondent, must comply with that statute;

(d) He will not have enough money for his social integration at the time of his statutory release.

[15] The Respondent submitted that it complied with the law by suspending the Appellant's OAS pension.

[27] The Member reviewed the sections and subsections of the applicable statutes, the evidence on file and the two paragraphs of the appeal request (in addition to the Appellant's submissions concerning the Charter) and found that:

[Translation]

[16] The Appellant did not specify the statute related to his 25% reduction argument.

[17] In this case, the evidence and the applicable statute are clear. Under subsection 5(3) of the OAS Act, the Appellant's OAS pension must be suspended as of July 2011, since he was incarcerated. Any amount paid after that time, while he was incarcerated, represents an overpayment recoverable by the Respondent under section 37 of the OAS Act.

[18] As a statutory entity, the Tribunal has only the powers conferred on it by its enabling statute. The Tribunal interprets and applies the provisions as set out in the OAS Act. Therefore, the Tribunal cannot consider the Appellant's argument about his financial needs and his reintroduction to society.

[19] Having regard to the salient facts and the relevant legislation, the Tribunal finds that the appeal has no reasonable chance of success.

Error by the General Division

[28] The General Division considered the case on the merits in the parties' absence and then found that the appeal could not succeed.

[29] The General Division did not apply the proper test to find that the appeal had to be summarily dismissed. This is an error of law reviewable on a standard of correctness.

[30] I note that there are several cases before the Tribunal's General Division in which the issue is whether subsection 5(3) of the OAS Act is unconstitutional. More specifically: is subsection 5(3) of the OAS Act discriminatory under section 15 of the Charter?

[31] The General Division in this case summarily dismissed the constitutional issue because the Appellant [translation] "did not specify a legislative provision or make arguments on a constitutional issue".

[32] However, is it plain and obvious on the record that the constitutional issue is clearly bound to fail, regardless of what evidence or arguments might be submitted at a hearing?

[33] I find that it is not plain and obvious.

[34] The decision is wrong, since it is not plain and obvious, regardless of what evidence or arguments might be submitted at a hearing, that the appeal is clearly bound to fail.

[35] Since the General Division did not apply the proper test and the decision was not correct, I am allowing the appeal. It is appropriate to refer the matter back to the Tribunal's General Division.

CONCLUSION

[36] The appeal is allowed and the matter is referred back to the Tribunal's General Division for reconsideration in accordance with these reasons.

Shu-Tai Cheng
Member, Appeal Division