

Citation: *K. B. v. Minister of Employment and Social Development*, 2015 SSTAD 929

Appeal No. AD-15-216

BETWEEN:

K. B.

Appellant

and

**Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)**

Respondent

**SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision**

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: July 28, 2015

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] On February 26, 2015, the General Division of the Social Security Tribunal of Canada (the Tribunal), summarily dismissed the Appellant's appeal from a determination that her entitlement to a pension under the *Old Age Security (OAS) Act* would commence in August 2010. The Appellant appeals from this summary dismissal of her appeal. On her behalf her Counsel submits that her application for a retirement pension should be deemed to have been received on August 11, 2007, the date on which a Service Canada employee advised her that she did not qualify for an OAS pension because she was in receipt of a Workplace Safety and Insurance Board survivor benefit.

[3] The Appellant argues that as she relied, to her detriment, on the erroneous advice of the Service Canada employee she ought not to be penalised for this reliance. The Appellant argues that the General Division failed to exercise its jurisdiction to vary the Minister's decision and to take remedial action to place the Appellant in the position she would have been in under the *Old Age Security Act* had the Service Canada employee not provided the erroneous advice

ISSUE

[4] The issue before the Tribunal can be framed in the following terms:

- a) Does the General Division have jurisdiction to vary the decision of the Minister in respect of the date from which payment of the Appellant's retirement pension commences?
- b) If the General Division has jurisdiction to vary the decision of the Minister in respect of the date from which payment of the Appellant's retirement pension commences did the General Division fail to exercise this jurisdiction in the Appellant's case?

THE LAW

[5] Under the *Department of Employment and Social Development Act* (DESD Act) subsection 56(1)¹ an applicant must first obtain leave before he or she can appeal to the Appeal Division of the Tribunal. However, where the General Division summarily dismisses an appeal no leave is necessary. The appeal is taken directly to the Appeal Division. Subsection 56(2) of the DESD Act governs the case. The subsection provides that

(2) Despite subsection (1) no leave is necessary in the case of an appeal brought under subsection 53(3) [summary dismissal by the General Division].

SUBMISSIONS

[6] Counsel for the Appellant submits, by virtue of the erroneous advice upon which the Appellant relied, she is entitled to greater retroactivity than the fifteen months provided for by subsection 8(2) of the *Old Age Security Act*. Counsel submits that the decision to vary the retroactivity was at the discretion of the Minister and that the General Division had jurisdiction to vary the start date of the Appellant's OAS pension. She argues that while the application was made on July 13, 2011, it should be deemed to have been received on August 11, 2007, the date on which the Appellant attained the age of sixty-five.

[7] The Respondent's Counsel counters that the General Division correctly stated the test for summary dismissal under section 53 of the DESD Act; that it correctly set out and applied the law with respect to maximum retroactivity of OAS pension payments and that the General Division did not err in its application of the facts to the law. Furthermore, Counsel for the Respondent argued that the General Division decision is reasonable and did not contain any reviewable error that would permit the Appeal Division to intervene. Therefore the appeal should be dismissed.

[8] With respect to the allegation of erroneous advice, the Respondent's Counsel took the position that the onus lies on applicants to apply for a benefit in a timely manner. In this regard, the Respondent's Counsel relies on the decision of the Review Tribunal in *L-67880*

¹ 56. Leave – (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.

v. MHRD, October 7, 2002. Further, the Respondent's Counsel argued that the onus was on the Appellant to prove her allegation of erroneous advice and, per *Grosvenor v. Canada* 2011 FC 799, the appropriate appeal jurisdiction is with the Federal Court not the Appeal Division of the Social Security Tribunal.

[9] The Respondent's Counsel also argued that the while the Tribunal may review a case of erroneous advice; it has no jurisdiction to remedy it. *Canada v. Vinet-Proulx* (2007) F.C. 99; *H-49921 vs. MHRD* April 6, 2000, which decided the Review Tribunal had no jurisdiction to set aside a decision made by the Minister under section 32 of the OAS Act. Finally, Counsel contended that in light of the uncontested facts, namely that the Appellant applied for an OAS pension in July 2011, and the applicable law, the Appellant received the maximum retroactivity payable.

ANALYSIS

[10] This dispute centres on the provisions of section 8 and section 32 of the OAS Act. The latter addresses the exercise of the Minister's discretion in cases of erroneous advice. Section 8 provides:

Payment of Pension

8. Commencement of pension – (1) Payment of pension to any person shall commence in the first month after the application therefor has been approved, but where an application is approved after the last day of the month in which it was received, the approval may be effective as of such earlier date, not prior to the day on which the application was received, as may be prescribed by regulation.

(2) *Exception* - Notwithstanding subsection (1), where a person who has applied to receive a pension attained the age of sixty-five years before the day on which the application was received, the approval of the application may be effective as of such earlier day, not before the later of

(a) a day one year before the day on which the application was received, and
(b) the day on which the applicant attained the age of sixty-five years as may be prescribed by regulation. *OAS Act, R.S.C. 1985, c. 0-9, para. 8(1) and (2) a).*

[11] Section 32 is titled “erroneous advice or administrative error” and provides that,

32. *Where person denied benefit due to departmental error, etc.-* where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied a benefit, or a portion of a benefit, in which that person would have been entitled under this Act, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made. *S.C. 1995. C. 33, s. 18*

Did the General Division err when it found that it did not have jurisdiction to vary the start date of the Appellant’s OAS pension?

[12] This is the nub of the issue before the Appeal Division. Counsel for the Appellant maintains that, by virtue of the erroneous advice that the Appellant received, the General Division had jurisdiction to extend the period of retroactivity. Counsel has consistently maintained this position. The Respondent’s Counsel is equally adamant that no such jurisdiction resides with the Tribunal. He maintains that the Appellant’s recourse is to the Federal Court. For the reasons set out below, the Tribunal concurs with the Respondent’s Counsel.

[13] Section 32 grants a discretionary power to the Minister to vary the period of retroactivity based on a finding that an applicant for an OAS benefit received erroneous advice or a finding that there has been an administrative error that worked to the detriment of an applicant. However, this presupposes that erroneous advice or administrative error has been established.² Regardless, the Tribunal is satisfied that the General Division, indeed the Tribunal, lacks the jurisdiction to offer the remedy the Appellant seeks.

² Both Counsel for the Appellant (AD-5) and the Respondent’s Counsel (AD-4) have advised the Tribunal that the Respondent has launched an investigation into the erroneous advice.

[14] Under its enabling legislation, the DESD Act, section 54 permits the General Division to hear appeals from decisions taken by the Minister. The DESD Act section 54 provides,

54. Decision – The General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given. (2012, c. 19, s. 224.)

[15] The General Division derives additional and specific jurisdiction to hear an appeal from a decision of the Minister taken under subsection 27(1) of the OAS Act from OAS section 28. Subsection 27(1) provides for reconsideration of earlier determinations. The section places the General Division in the position formerly occupied by the Review Tribunal. Section 28 states,

28. Appeal – benefits – (1) A person who is dissatisfied with a decision of the Minister made under section 27.1, including a decision in relation to further time to make a request, or, subject to the regulations, any person on their behalf, may appeal the decision to the Social Security Tribunal established under s. 44 of the *Department of Employment and Social Development Act*. (1997, c. 40, s. 101; 2012, c. 19, s. 236(1); 2013, c.40. s. 236 91)(g)(iv).)

[16] The case law pertaining to subsection 27(1) prescribes the remedy available to an applicant where “erroneous advice” is claimed, namely that the only remedy available to an aggrieved applicant is to apply to the Federal Court for judicial review of the Minister’s decision. *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.

[17] Case law under section 28 makes clear that a Review Tribunal (ergo the General Division) can exercise only such jurisdiction as granted by its enabling statutes. Thus in *B-49043 v. MHRD*, (April 6, 2000) (RT) it was held that the “pensioner's ignorance of the existence of the widowed spouse's allowance at the time of the spouse's death does not confer authority on the Review Tribunal to award a longer period of retroactivity than the 11-month statutory maximum”.

[18] Similarly, case after case addressing section 32 and the jurisdiction of the Review Tribunal has taken the position that a Review Tribunal does not have the power to entertain an appeal of the Minister’s decision made under OAS section 32. Consequently, the General Division, too, lacks this power.

[19] Support for this position is found in *Attorney General v. Lise Vinet-Proulx*, T-200-06, 2007 FC 99. In a case on all fours with the instant appeal, the Federal Court delineated the jurisdiction of the Review Tribunal in relation to decisions of the Minister made under OAS, s. 32. Martineau, J. stated at paragraph 12:

[12] As may be seen, the Review Tribunal is a statutory tribunal whose jurisdiction and authority are set out in particular in subsection 27.1(1) and in section 28 of the Act, as well as in sections 82 and 84 of the CPP. Accordingly, the Review Tribunal does not have any jurisdiction in equity and may not, for example, order the Minister to make an *ex gratia* payment (*Canada (Minister of Human Resources Development Canada) v. Dublin (Estate of)*, *supra*). However, it has already been decided that a review tribunal does not have jurisdiction to set aside a decision of the Minister made under section 32 of the Act. In such a case, it is the Federal Court that has jurisdiction (*Pincombe v. Canada (Attorney General)*, [1995] F.C.J. No. 1320 (F.C.A.) (QL); *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278, 2003 FCA 278, [2003] F.C.J. No. 998 (QL); *Kissoon v. Canada (Minister of Human Resources Development Canada)*, 2004 FCA 384, 2004 FCA 384, [2004] F.C.J. No. 1949 (QL); *Canada (Minister of Human Resources Development) v. Mitchell*, 2004 FC 437, 2004 FC 437, [2004] F.C.J. No. 578 (F.C.) (QL)).

[20] Martineau, J. went on to discuss a Review Tribunal's jurisdiction to hear the appeal against the reconsideration decision and to draw a distinction between that jurisdiction and the jurisdiction to vary the Minister's discretionary section 32 decision in respect of Ms. Vinet-Proulx:

[13] The Minister's revised decision was rendered pursuant to subsection 27.1(2) of the Act. Accordingly, the Review Tribunal had jurisdiction under subsection 28(1) of the Act to hear the appeal brought by Ms. Vinet-Proulx against the revised decision (*Minister of Human Resources Development v. Dublin (Estate of)*, *supra*). In such a case, under subsection 82(11) of the CPP, the Review Tribunal has jurisdiction to confirm or vary the Minister's revised decision and may take any measure that might have been taken by the Minister under subsection 27.1(2) of the Act. Under this subsection, the Minister may take the following measures: he may confirm or vary the previous decision, either by approving the payment of the benefit and determining its amount or by determining that no benefit is payable. It should be noted that, under the Act, the term "benefit" means "a pension, supplement or allowance", which are payments authorized under Parts I, II and III, respectively.

[21] The General Division retains the same CPP section 82 jurisdiction, thus Martineau, J's *dicta* remains as applicable today as it did to Ms. Vinet-Proulx. Accordingly, the Tribunal finds

that while the General Division could entertain the Appellant's appeal it could not alter the Minister's decision in her favour given the terms of OAS subsection 8(2), which, while it allows for a retroactive payment, limits the period of retroactivity.³

[22] Again, in *Vinet-Proulx*, Martineau, J. discussed this situation, concluding as follows:

[13] Therefore, the question arises as to whether in the case of a request for reconsideration of the Minister's initial decision; the Minister was authorized under subsection 27.1(2) of the Act, following the approval of the application for benefits received on April 14, 2004, to allow the retroactive payment of a pension for a period previous to May 2003. In this case, subsection 8(2) of the Act and subsection 5(2) of the Regulations are clear and do not give the Minister any discretion: the approval of the application for benefits cannot take effect any earlier than one year before the date the application in question was received. Under subsection 3(2) of the Regulations, the application for benefits that gave rise to the Minister's initial decision was received by the Department on April 14, 2004, and was "deemed to have been made" by Ms. Vinet-Proulx on that date. Accordingly, I conclude that the Review Tribunal did not have jurisdiction to award pension benefits retroactively from the month of July 2002, as this is contrary to the legislative and regulatory provisions on which the Minister's initial decision and revised decision are based.

³ 3 OAS subsection 8(2) allows for retroactive payment of the OAS. Approval of the pension is limited to the later of two events, one of which is 'a day one year before the day on which the application is received' retroactivity is limited to one year. This stipulation is repeated in the OAS Regulations at section 5. Subsection 5(1) prescribes the conditions for approving an application for OAS pension. It states,

5(1) Subject to subsection (2), where the Minister

- (a) is satisfied that an applicant is qualified for a pension in accordance with sections 3 to 5 of the Act, and
- (b) approves the application after the last day of the month in which it was received, the Minister's approval shall be effective on the latest of
- (c) the day on which the application was received,
- (d) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act, and
- (e) the date specified in writing by the applicant.

[1] The same stipulation appears in the *OAS* Regulations, which provides at paragraph 5(2)(a),

- (2) Where the Minister is satisfied that an applicant mentioned in subsection (1) attained the age of 65 years before the day on which the application was received, the Minister's approval of the application shall be effective as of **the latest of**
- (a) the day that is one year before the day on which the application was received,
- (b) the day on which the applicant attained the age of 65 years;
- (c) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act; and
- (d) the month immediately before the date specified in writing by the applicant.

OAS Regulations, C.R.C., c. 1246

[23] Similarly, the Tribunal concludes that the General Division does not have jurisdiction to award the Appellant pension benefits retroactive to August 2007. The Appellant's recourse in respect of the alleged erroneous advice lies with the Federal Court.

CONCLUSION

[24] The Appeal is dismissed.

Hazelyn Ross

Member, Appeal Division