

Citation: *T. B. v. Minister of Employment and Social Development*, 2015 SSTAD 1016

Date: August 26, 2015

File number: AD-15-345

APPEAL DIVISION

Between:

T. B.

Appellant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on August 26, 2015

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] The Appellant applied for an Old Age Security (OAS), pension in June 2011. The Respondent found her eligible to receive the pension with an effective commencement date of July 2010. The Appellant asked the Respondent to reconsider the start date of the pension. She asked that the payment of the OAS pension be backdated to October 2008 when she turned sixty- five years old. The Reconsideration request having been denied, the Appellant appealed to the Office of the Commissioner of Review Tribunals, which transferred her file to the Social Security Tribunal (the Tribunal), on April 1, 2013. On April 21, 2015, a Member of the Tribunal's General Division summarily dismissed the appeal.

GROUND OF THE APPEAL

[3] The Appellant submitted that the General Division failed to observe a principle of natural justice because of "its inability to take into account, compassion, fairness, or extenuating circumstances, thus denying a citizen their true rights under the Act, which act certainly wasn't intended to do so, on the mere grounds of strict interpretation of the law."

[4] This submission is a clear reference to the General Division conclusion that,

[16] The Tribunal understands that the Appellant reached age 65 in 2008; however, the Tribunal is unable to award any retroactivity earlier than what has already been paid. This Tribunal does not have jurisdiction to render decisions on the basis of compassion, fairness, or extenuating circumstances. The Tribunal must apply the provisions as they are set out in the OAS Act (*Canada (Minister of Human Resources Development) v. Esler*, 2004 FC 1567).

THE LAW

[5] The *Department of Employment and Social Development (DESD) Act* provides for three grounds of appeal only. These grounds are an error of law, error of fact or a breach of natural justice or a refusal by the General Division to exercise its jurisdiction.¹

[6] Section 8 of the OAS Act governs the payment of an OAS pension. Under the heading “Payment of Pension”, the section provides,

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) & (2)(a).*

ISSUE

[7] The questions to be decided on this appeal are:

- (1) Did the General Division refuse to exercise its discretion when it decided to summarily dismiss the Appellant’s appeal?

¹ **58(1) Grounds of Appeal** –

- 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

- (2) Did the General Division decision to summarily dismiss the appeal give rise to a breach of a principle of natural justice or other reviewable error pursuant to section 58 of the DESD Act?

SUBMISSIONS

[8] Where, as in the instant case, the appeal is an appeal from a decision to summarily dismiss an appeal, section 36 of the Tribunal Regulations² allows the parties 45 days from the date the appeal is filed either to file submissions or to notify the Tribunal that they have no submissions to file. Both the Appellant and the Respondent filed submissions. However, it was only the Respondent that filed fulsome submissions. The Appellant's submissions were limited to expressing her desire that all pertinent facts and law be applied to her appeal.

ANALYSIS

Standard of Review

[9] The leading case with respect to the standard of review on appeal is *Dunsmuir v. New Brunswick* 2008 SCC 9. In *Dunsmuir*, the Supreme Court of Canada concluded that when a Tribunal is reviewing a decision on questions of fact; questions of mixed fact and law; and questions of law relating to a tribunal's own statute, the standard of review is reasonableness. The Tribunal finds that reasonableness is the appropriate standard of review in this appeal because the determination involves questions of mixed fact and law. This is the position taken by Counsel for the Respondent and for the following reason the Tribunal agrees that reasonableness is the appropriate standard of review of the General Division decision.

[10] The underlying and real issue that was before the General Division was whether the Appellant had made her application for OAS benefits within a time frame that would allow for payments retroactive to October 2008. In the alternative, the General Division had to decide whether, if the Appellant had not made the Application in the required time frame, it had jurisdiction to apply a greater period of retroactivity. These questions involve anterior findings of fact in relation to the application for the pension, as well as the application of the governing

² *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236.*

law. Thus, the question being one of mixed fact and law, the Tribunal agrees that “reasonableness” is the appropriate standard of review.

[11] The Tribunal finds that the General Division Member properly stated the law in regard to summary dismissal of appeals as well as the law governing the commencement of payment of OAS pensions, namely section 53 of the DESD Act and section 8 of the OAS Act, at paragraphs 4, 6 and 7 of the GD decision, respectively. The Appellant would have the Tribunal order greater retroactivity than the 12 months it did; however, section 8 of the OAS Act specifically provides for a period of retroactivity of “not before the later of a day one year before the day” on which the Respondent received the application for OAS pension and the day on which an applicant turned 65 years old. In the Appellant’s case, the later date is that of July 2010 as she turned 65 in October 2008. Thus the General Division decision properly applied the law to the facts of the Appellant’s case.

[12] The Appellant contends that the General Division should have taken a more compassionate and fairer approach to the dispensation of her appeal and not bind itself in the black letter of the law. She takes the position that the General Division ought to have taken into account what she sees as extenuating circumstances, namely that she did not know that she had to apply for the OAS at the same time as she applied for an Old Age Pension. However, this is not a position that is open to the General Division or the Tribunal for that matter. The Tribunal being a creature of statute can exercise only such jurisdiction as is granted to it by the statute. In this case the statute has expressly limited the period of retroactivity to one year and the Tribunal has no power to exceed this period. This position has been made clear in a number of Review Tribunal decisions where similar failures to apply for the OAS pension were discussed. Thus in *F-3773 v. MHRD (January 8, 1999) (RT)*, a Review Tribunal concluded that the November 1995 amendment to section 8 of the OAS Act, restricting retroactivity to one year “applied to all applications made after the amendment came into effect, even though the applicant became entitled to apply prior to that date.”

[13] The Tribunal’s statutory authority with regards to retroactive benefits were amply discussed by the Federal Court in *Canada (Minister of Human Resources Development) v. Esler*, 2004 FC 1567 as well as in *Canada (Procureur Général) v. Vinet-Proulx*, 2007 FC 99.

In both cases, the Federal Court clarified that a “Review Tribunal is a creature of pure statutes and as such, has no inherent equitable jurisdiction which would allow it to ignore the clear legislative provision contained in s. 8(2) and use the principle of fairness to grant retroactive benefits in excess of the statutory limit.” The General Division as the successor to the Review Tribunal is similarly placed. Thus the General Division had no authority to consider equitable concerns and to grant the Appellant the retroactivity she sought. It follows then that the General Division did not refuse to exercise its discretion when it decided to summarily dismiss the Appellant’s appeal decision in this regard, as it could not exercise that which it does not have.

The Decision to Summarily Dismiss the Appeal

[14] The question under this head is whether by summarily dismissing the appeal, the General Division breached a principle of natural justice or otherwise committed a reviewable error pursuant to section 58 of the DESD Act. For the reasons that follow, the Tribunal answers this question in the negative.

[15] The DESD Act, subsection 53(1) mandates that the General Division must summarily dismiss an appeal if it satisfied that it has no reasonable chance of success. The question being what amounts to a reasonable chance of success. In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

[16] While what is an arguable case may be open to debate, I conclude that where the facts are not in dispute, the applicable law is clear; and where on the undisputed facts and law only one clear decision can be made and that decision is not in an appellant’s favour; then it is appropriate for the General Division to dismiss the appeal summarily.

[17] In the instant case, the facts are not in dispute, the Appellant turned sixty-five in October 2008, she applied for a Canada Pension Plan Old Age pension, but did not apply for an OAS pension. She explains that she was unaware that she had to make a separate application. The Appellant applied for an OAS pension in June 2011 and was granted the pension retroactive to July 2010. The only question that is in dispute is the appropriate

commencement date of the Appellant's OAS pension. She argues that it should be October 2008; the Respondent submits that the applicable law limits the period of retroactivity to one year from the application date, that being in the Appellant's case, July 2010. I find that on the facts and the law, the General Division lacked the jurisdiction to make any other decision than the one it did. Accordingly, the Appellant's appeal would have no reasonable chance of success and could only fail, that is, it was bound to have only one outcome. Accordingly, it was appropriate for the General Division to dismiss the appeal on a summary basis as mandated by subsection 53(1) of the DESD Act.

CONCLUSION

[18] The Appellant appealed the decision of the General Division to summarily dismiss her appeal. On the facts, evidence and law that was presented to the General Division, the Appeal Division finds that the appeal had no reasonable chance of success; and that the General Division lacks an equitable jurisdiction to consider extenuating circumstances in its determination of the maximum period of retroactivity. Accordingly, the General Division decision was reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law and the requirements of the CPP and Regulations.

[19] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division